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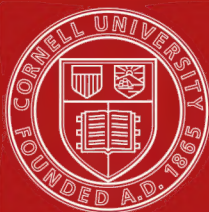
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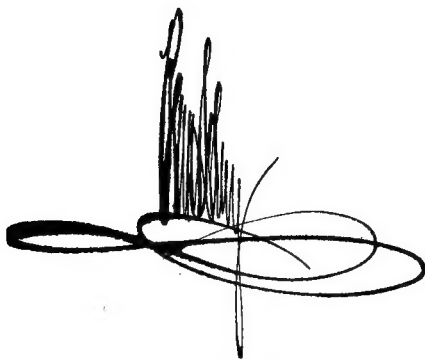
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A TREATISE  
ON THE  
LAW OF STOCK-BROKERS  
AND  
STOCK-EXCHANGES



BY  
JOHN R. DOS PASSOS  
OF THE NEW YORK BAR



NEW YORK  
HARPER & BROTHERS, FRANKLIN SQUARE  
1882



at one time the sole source of investment, has, in this respect, fallen into a secondary rank behind railroad and other commercial companies which offer attractive and regular returns to capital, and whose shares may be carried about by their owners wherever they may go, defying alike the depredations of crime, the ravages of time, and the destruction of the elements.

As a result of this condition of affairs, Stock Exchanges have become of incontestable value to the public.

In the first place, all securities which have been admitted to their lists can, as a general rule, be readily converted into *cash*. Irrespective of the regular investors, and of the professional operators outside of the exchanges (factors of the greatest magnitude in stock dealings), there is a trading element inside of those bodies—represented in the London Exchange by the “Jobber,” and in the New York Stock Exchange by the “Scalper”—which is ready at a moment’s notice to deal in and pay for any number of shares that may be offered for sale; and which, in times of exciting panics, constitutes the breakwater against great financial disasters. It is absolutely certain that without the existence of great public marts like the New York and London Stock Exchanges the marvellous development and progress of this country, which make it the admiration and wonder of the civilized world, would not have been attained. And this truth was recognized by Bramwell, L. J., in a leading case in England, in which the transactions of the London Stock Exchange had been violently assailed as mere gambling devices and in hostility to the true interests of the country,<sup>1</sup> and who, in sustaining those operations, said: “I am not sure that it is a disadvantage that there should be a market where speculation may go on, for it is owing to a market of that kind that we now have so many railways and other useful undertakings.”

<sup>1</sup> *Thacker vs. Hardy*, L. R. 4 Q. B. Div. 685, 693.

In May, 1877, a commission<sup>1</sup> was appointed by royal decree to inquire into the origin, object, present constitution, customs, usages, and mode of transacting business on the London Stock Exchange, which commission reported, in July, 1878, after a careful study of the subject, among others, the following suggestions to Parliament, then in session :

“The main object of the association appears to be the easy and expeditious transaction of business, and the enforcement among themselves of fair dealing.

“Our opinion is that, in the main, the existence of such an association, and the coercive action of the rules which it enforces upon the transaction of business, and upon the conduct of its members, have been salutary to the interest of the public.

“We recognize a great public advantage in the fact that those who buy or sell for the public in a market of such enormous magnitude in point of value should be bound in their dealings by rules for the enforcement of fair dealing and the repression of fraud, capable of affording relief and exercising restraint far more prompt, and often more satisfactory, than any within the reach of the courts of law.”

The commission closes its report as follows :

“It is recommended by us, not because we have any reason to think that the present association has at all, in the main, fallen short of its duties in the past, but rather for the purpose of strengthening its hands and increasing its efficiency in the future, that the London Stock Exchange be incorporated either by royal charter or an act of Parliament; and if, preserving the element of self-government, additional weight could be given to the institution, and additional consideration and reliance be bestowed upon its members, by investing the existing association with a public character in the form of a charter of incorporation, we are of opinion that it would be a sensible gain to the public.”

At various times within the last century and a half, the legislatures of the different countries and states, acting under a spasmodic public sentiment, have sought to prevent speculations in securities and stocks by enacting stringent and severe laws against such practices, generally known as “Stock-jobbing Acts.” But, as will be seen in the eighth chapter of

<sup>1</sup> See post, 261.

The ground covered in the present work is entirely new, and hence I have not hesitated to discuss the various questions with freedom, but, as I trust, without dogmatism. My aim has always been to arrive at the correct result, and it is sincerely hoped that the reasoning which has been used in attempting this is such as will commend itself to my professional brethren and to the public. The relation of a Broker to his Client is an anomalous one, having no ascertained place in the well-settled rules of the law of principal and agent; it is *sui generis*, and in the course of time a body of law will be formed as distinctive and separate as that which governs the conduct of an agent in his dealings with his principal, a trustee with his *cestui que trust*, or a guardian with his ward.

In the discussion of the nature and kind of securities in which a Broker deals, a vast subject was opened, capable of filling a dozen volumes, and much of it has been already ably treated by other authors; and in this respect the dilemma was not what to put in, but what to keep out. If I have been judicious in my selections, it is all that I can hope for. I desire in this connection to acknowledge the invaluable assistance of my brother, Benjamin F. Dos Passos, Esq., of the New York Bar, in the preparation of the work and of its index. Finally, I submit the book to the profession and the public, with the feeling that the subject has been at least fully opened, and that I have endeavored, to the best of my ability, to perform the task in a manner which should make the volume satisfactory and valuable.

NEW YORK, *March*, 1882.

JOHN R. DOS PASSOS.



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# LAW OF STOCK-BROKERS

AND

## STOCK EXCHANGES.

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### CHAPTER I.

#### INTRODUCTION.

#### *Origin of Stock-brokers and Stock Exchanges.*

THERE is a great diversity of opinion respecting the origin of the word "Broker," some of the authorities maintaining that it was originally applied to those who broke up goods into small pieces—retailers; while others contend that the term is derived from the Saxon word *broc*, misfortune, and that the name "Broker" comes from one who was a broken trader by misfortune, which is often the true reason for a man's breaking, and that none but that class of persons were formerly admitted to that employment in London.<sup>1</sup> But the

<sup>1</sup> Jacob's Law Dict., tit. "Brokers." "The etymology of the term Broker has been variously given. By some it has been derived from the Saxon *broc*, misfortune, as denoting a broken trader; the occupation being formerly confined, it is said, to unfortunate persons of that description (Tomlins). According to others, it was formed from the French *broieur*, a grinder or breaker into small pieces; a Broker being one who *beats* or draws a bargain into particulars (Termes de la Ley, Cowell). The law Latin from *obrocator*, however, seems to point distinctly to the Saxon *abræcan* (to break), as the true root, which in the old word *abbroachment* (q. v.) or *abroachment*, had the sense of *breaking up goods*, or selling at retail. A Broker, therefore, would seem to have originally been a *retailer*, and hence we find the old word *auctionarius* (q. v.) used in both these senses" (Burrill's Law Dict., tit. "Broker"). Wharton gives, as the deriva-

statutes passed in the reigns of Edward the First and James the First, hereafter referred to, would seem to indicate that the latter view can hardly be correct. In England, the term "Broker" occurs in an act of Parliament as early as the year 1285.<sup>1</sup> It recites, in substance, that whereas divers persons do resort unto the city (London) from parts beyond the sea, fugitives from their own lands, and of these some become "Brokers," hostlers, and innkeepers, etc., and they do wear fine clothing, and do eat costly meat and food, etc.; it therefore enacts that "there shall be no Broker in the city except those who are admitted and sworn before the warden, mayor, or aldermen." It is evident, from a perusal of this statute, that the occupation of Brokers in those days was subverted by persons who used the name as a cover to transact a species of disreputable pawnbroker's business; and hence the severe penalties of the second section of the act, which provided that "if any other innkeeper or Broker be found within the city, or any other of whom there is evil suspicion, he shall be arrested by the warden, or mayor, or the sheriffs, or the alderman of the ward, and punished; viz., innkeepers and Brokers shall be incapable of their freedom and adjudged to prison, and the others shall be punished by imprisonment or otherwise."<sup>2</sup>

tion of the word, the French *broceur*, and the Latin *tritor*, a person who breaks into small pieces (Whar., Law Dict., tit. "Broker"). Webster gives as its derivation, the old English *broccour*, Norman French *broggour*, French *brocanteur*. Under the word "broke," to deal in second-hand goods, to be a Broker, Webster says it is probably derived from the word *brock*. Worcester derives it from the Anglo-Saxon *brucan*, to discharge an office; *brocian*, to oppress; and the French *broyer*, to grind. See "Broke" and "Broker." The word "Broker" seems first to occur in literature in Piers Ploughman, "Among burgeises have I be

Dwellyng at London. And gart Backbiting be a broccour. To blame men's ware." It clearly means here a *fault-finder*, as in Provençal *brac* is refuse. The Broker was originally one who inspected goods and rejected what was below the standard (Wedgewood).

<sup>1</sup> 13 Ed. I., Stat. Civ. London, 1285.

<sup>2</sup> See also 2 Crabb's Dig. of Stat., tit. "Brokers," 261. There were a class of persons known to the Romans, who were deemed public officers, and who united the functions of bankers, exchangers, Brokers, commissioners, and notaries. all in one, under the description of *proxenetae*.

The next statute, passed in the reign of James the First, more than three hundred years after that just recited,<sup>1</sup> regulates the calling of Brokers with greater detail than the first act, and clearly shows, by the use of the words "merchandise and wares," that down to this period the Broker in money, stock, and funds had no recognized legal existence. The preamble to the statute also indicates that the regular calling was and had been a favored one: "Forasmuch as of long and ancient time by divers hundreds years there have been used within the City of London and Liberties thereof, certain Freemen of the city to be selected out of the Companies and Mysteries whereof they are free and Members, and the same persons to be presented at least by six approved and known honest persons of the same Mystery to the Lord Mayor of London for the time being, and to the Aldermen his Brethren, and to be recommended by such Presentors to be persons for their known approved Honesty, Integrity, and Faithfulness, Persons meet for to be Broker Brokers." It was not until the latter part of the seventeenth century, when the East India Company came prominently before the public,<sup>2</sup> that trading or speculating in stock became an established business in England; and the term "Broker," which had then a well-understood meaning, was promptly transferred to those persons who were employed to buy or sell stock or shares, and who thenceforth became known as "Stock-brokers." In 1692, William the Third having adopted, for the first time in England, the system of raising funds<sup>3</sup> for governmental purposes by creat-

(Whar., Law Dict., tit. "Brokers;" Dictionary, revised by Lewis and Story on Ag. § 20, Dig. Lib. 50, tit. 14, ch. 2.) Spelman, cited in Gibbons vs. Rule, 12 Moo. 539, 543. There is very high authority, however, for asserting that the term *proxeneta* does not occur in any Latin author before the first century after Christ. See Freund's Latin

Short, where *proxeneta* is thus given: "negotiator, factor, broker, agent, Sen. Ep. 119; Mart. 10. 3. 4; Dig. 50. 14. 2."

<sup>1</sup> 1 Jac. I. c. 21, 1604.

<sup>2</sup> This company was incorporated by Queen Elizabeth in 1600.

<sup>3</sup> The system of obtaining money

ing a national debt, speculations in the "funds" and the shares of the East India Company at once became general;<sup>1</sup> and in 1697 the Brokers and Stock-jobbers, to borrow from the language of the statute passed in that year, had been guilty of such "unjust practices and designs" in selling and discounting tallies, bank stock, bank bills, shares and interest in joint stock, that it became necessary to pass a stringent act, by which no persons except regularly sworn appointees were permitted to act as Brokers; and the latter were compelled to keep a register in which all contracts were to be entered within three days after they were made, and their compensation was fixed at ten shillings per centum.<sup>2</sup> And Best, C. J., in commenting upon this statute, says: "The statute 8 and 9 William III., ch. 20, by which the first government loan was raised, speaks of a new description of 'Brokers'—persons employed in buying and selling tallies, the government securities of those days: these have since been called *Stock-brokers*."<sup>3</sup> Several other similar statutes were passed in the subsequent reigns of Anne and George.<sup>4</sup>

An early legal writer gives the following account of Stock-brokers, which is interesting in this connection: "Stock-brokers are persons who confine their transactions to the buying and selling of property in the public funds and other securities for money, and they are employed by the proprietors or holders of the said securities. Of late years, owing to the prodigious increase of the funded debt of the nation, commonly called the stock, they are become a very numerous and considerable

for government purposes by loans is said to have originated in the fifteenth century in Venice. It was next adopted by Holland, and was introduced into England shortly after the Revolution of 1688 (Tit. "Funds," Cyclopædia of Com. [Waterston]).

<sup>1</sup> Francis's *Chronicles and Characters of the Stock Exchange*, 24.

<sup>2</sup> 8 & 9 Wm. III. c. 32, 1697, continued by 11 and 12 Wm. III. c. 13.

<sup>3</sup> *Gibbons vs. Rule*, 1827, 12 Moo. 539; 4 Bing. 301.

<sup>4</sup> 6 Anne, c. 16, 1707; 10 *ibid.* c. 19, 1711; 12 *ibid.* Stat. 2, c. 16; 6 Geo. I. c. 18, 1719; 3 Geo. II. c. 31, 1730; 7 Geo. II. c. 8, 1734.

body, and have built, by subscription, a room near the Bank, wherein they meet to transact business with their principals, and with each other; and to prepare and settle their proceedings before they go to the transfer-offices at the Bank, the South Sea, and India houses, thereby preventing a great deal of confusion at the public offices, where the concourse of people is so great, during the hours of transferring stock, that if the business was not prepared beforehand, it would be impossible to transact it within the given time.”<sup>1</sup> The whole business of stock-jobbing being contrary to law, except as the persons acting as Brokers were licensed, under the act of 6 Anne, ch. 16; and as many other persons, irrespective of the requirements of the statute, acted as Stock-brokers without having received a license as such, a *silver medal* was given to each licensed Broker, having the king’s arms on one side, and the arms of the city of London on the reverse, with the Broker’s name, which he was ordered to produce upon every occasion when he should be required to show his qualification; and, to give further publicity to the names of the regular Brokers, a list of the licensed Brokers was annually printed by the order of the Lord Mayor and Court of Aldermen, which was hung up in the walks of the Royal Exchange and in Guildhall, and at most of the reputable coffee-houses near the Exchange. This was before the Brokers left the Royal Exchange and located their business in Change Alley.<sup>2</sup> By an act passed in 1870,<sup>3</sup> called the “London Broker’s Relief Act,” the restrictions and guards which were formerly placed upon Stock-brokers were removed, and the jurisdiction of the Court of Aldermen over Brokers ceased. The effect of this act is practically to enable any person to exercise the calling of Broker in London, outside of the Stock Exchange; and this

<sup>1</sup> Beaw. Lex. Mer. 620.

<sup>2</sup> “Jonathan’s” Coffee-house, in Change Alley, the general mart for Stock-jobbers, was the precursor of

the present Stock Exchange in Capel Court.—Addison in Sir R. De Coverley.

<sup>3</sup> 33 & 34 Vict. c. 60.

result seems to be justly deplored in the Report of the Royal Stock Exchange Commission presented to Parliament in 1878.<sup>1</sup>

The advantage of employing Brokers as intermediaries, in the purchase and sale of property, seems to have been early recognized among the merchants; and a very old writer on the law merchant says, "It is an old proverb, and very true, that between *what will you buy?* and *what will you sell?* there is twenty in the hundred differing in the price, which is the cause that all the nations do more effect to sell their commodities with reputation by means of Brokers than we do; for that which seems to be gotten thereby is more than double lost another way. Besides, that by that course many differences are prevented which arise between man and man in their bargains or verbal contracts; for the testimony of a sworn Broker and his book together is sufficient to end the same."<sup>2</sup>

The Venetians, says Malynes, had an office called *Messacaria* (Messageria?), consisting only of brokers who dealt between man and man; "and in Spain they are of such estimation that they ride on horseback, upon their foot-cloths; and, having the invoices of merchants' goods, they will deal for great matters at a time, against the lading of the fleet from Nova Espagna, and the islands of the West Indies, to be paid partly ready money and partly at the return of the said fleet; and these afterwards let you understand their merchant."<sup>3</sup>

The origin of stock-certificates—dealings in which, at the present date, constitute the main business of Stock-brokers—cannot in England be satisfactorily traced beyond the middle of the seventeenth century. Such species of property was altogether unknown to the law in ancient times, nor, indeed, was it in usage and practice until a short period antecedent to

<sup>1</sup> See post, p. 248.

<sup>3</sup> Mal. Lex Mer. 143.

<sup>2</sup> Mal. Lex Mer. 143 (1622).

the passage of the Bubble Act in the reign of George the First.<sup>1</sup>

Although it is fully established that mercantile or commercial corporations existed among the Romans,<sup>2</sup> and though much light has been thrown upon the character and mode of conducting these bodies,<sup>3</sup> there is an utter dearth of information respecting the form and manner by which ownership in the corporate property was attested and established. The Roman law required three persons to organize a corporation;<sup>4</sup> and as each body had at least that number of members, if not more, it would seem but natural that a certificate, or some other substantial muniment of title, should have been issued by

<sup>1</sup> *Garrard vs. Hardey*, 5 Man. & G. 471, 483.

<sup>2</sup> Aug. & Ames on Corps. (10th ed.) ch. 18, § 26: "A *Collegium Mercatorum* existed at Rome 493 B.C.; but the modern bourse, from the Latin *bursa*, a purse, originated about the fifteenth century. Bourges and Amsterdam contend for the honor of having erected the first bourse. The Paris Bourse was erected in 1808" (Johnson's New Univ. Cyclop., tit. "Bourse"). "À Rome, malgré que le commerce n'y fût pas en grande considération, nous trouvons ce même usage publiquement pratiqué. Tite Live nous apprend, en effet, qu'en l'an 259 de sa fondation, sous le consulat d'Appius Claudius et de Publius Servilius, on construisit un vaste édifice, dont les vestiges portent encore le nom de *Loggia*, et qui, sous la dénomination de *Collegium Mercatorum*, avait une destination analogue à celle de nos bourses actuelles" (Droit Commercial, "Bourses de Commerce," par Bédarride). But, according to Livy (ii. 27), the *Collegium Mercatorum* does not belong to this period. Livy says that when the consuls were disputing which of them should have the honor of dedicating a temple to Mercury, the

question was referred to the people; and the Senate decreed that whichever of the consuls should be chosen should also form a "*Collegium Mercatorum*," or association of corn-dealers, to help him and the priest in religious and mercantile matters related to the temple. But the plan fell through, and it does not appear that the "*Collegium*" was ever formed; nor that it would have had, if formed, anything but a religious significance. Accordingly, the above citations seem to be unfounded.

<sup>3</sup> Brown's Lect. Civ. Law (2d ed.), 141.

<sup>4</sup> *Tres faciunt collegium*, Aug. & Ames on Corps. ch. 18, § 26 (10th ed.); Ortolan's Hist. Roman Law, 606. Though in Rome, it seems, corporations did not require charters from the State, the latter, by virtue of its police power, suppressed those which appeared to be dangerous, mostly those of a political character. In order to determine whether such a corporation existed, the words *tres faciunt collegium* were used. But that a corporation could exist with only one member left is well settled (l. 7, 2, D. 3, 4). Gaudsmit Pandects, I. 71, 1; Windscheidt, I. 60, 3; Arndts, 44, 2.

the corporation to its respective members, in which the proportion of interest of each in the capital or corporate property of the association appeared. But whether a certificate was, in fact, issued, and, if so, was regarded as property capable of sale or other negotiation, and of vesting in the representatives of the owner, on his decease, or whether the corporations were all of the nature of guilds conferring upon the members mere *personal* rights—all of these questions seem now to be incapable of solution; and the Roman law, which sheds such floods of light upon commercial subjects, apparently leaves the above matters in total darkness.

In England, stock-certificates were not introduced into the courts of law for many years after they had become established in the mercantile community; for Lord Mansfield, in 1770,<sup>1</sup> in a case wherein it was contended that such certificates were *money*, in deciding against that view, said: "This is a *new species of property arisen within the compass of a few years*. It is not money."<sup>2</sup> The Bubble Act<sup>3</sup> having been repealed,<sup>4</sup> it was held<sup>5</sup> that the formation of a company, the stock in which should be transferable, was not an offence at common-law. And this doctrine was subsequently affirmed.<sup>6</sup>

A Stock Exchange or Bourse, in the sense in which it is considered in this work, is also a creation of modern times.

An Exchange was erected in Cornhill, London, in 1571, but it was used exclusively by dealers and Brokers in merchandise. This structure was destroyed in the great fire of 1666;<sup>7</sup> but it was not until several years after, when it was rebuilt, that the Brokers in funds and stock were assigned a portion of the building for the transaction of their business.

<sup>1</sup> *Nightingale vs. Devisme*, 5 Burr. 2589.

<sup>2</sup> To same effect, *Jones vs. Brinley*, 1 East. 1.

<sup>3</sup> 6 Geo. I. c. 18.

<sup>4</sup> 6 Geo. IV. c. 91.

<sup>5</sup> *Garrard vs. Hardey*, 5 Man. and G. 471.

<sup>6</sup> *Harrison vs. Heathorn*, 6 Man. and G. 81; 1 Pars. Con. (6th ed.) 144.

<sup>7</sup> *Johnson's New Univ. Cyclop.*, tit. "Stock Exchange."



In 1698, the Stock-jobbers, annoyed by the objections made to their remaining in the Royal Exchange, and finding their numbers seriously increased, removed to Change Alley, a large and unoccupied space, where extensive operations might be carried on.<sup>1</sup>

In the United States there seems to be no trace of a Stock Exchange until about the beginning of the present century, at which time there existed in Philadelphia a Board of Stock-brokers, possessing a formal organization and regular constitution, which the Brokers in New York, in 1817, used as a model in framing the rules of their own Exchange.<sup>2</sup>

Although there is in the archives of the New York Stock Exchange a document bearing date May 17, 1792, signed by a number of Brokers, in which it is, *inter alia*, stated that "We, the subscribers, Brokers for the purchase and sale of public stock, agree to do business at not less than one fourth of one per cent.," no organization appears to have been formed in the city of New York until the year 1817, when a constitution was adopted, which is no longer in existence, it having been destroyed in the great fire of 1835.<sup>3</sup>

<sup>1</sup> Francis's *Chronicles and Characters of Stock Exchange*, 24; see also Report of Royal Stock Exchange Commission, July, 1878, and post, p. 248.

<sup>2</sup> Medbery's *Men and Mysteries of Wall Street*, 286.

<sup>3</sup> "The earliest annals of the New York Stock Exchange are meagre, the fire of 1835 having destroyed the record of the constitution adopted in 1817, the date of its first regular organization. A tablet in the wall of the present room recites that the Exchange was founded in 1792, but the evidence of that exists only in a document still preserved among its archives" (Johnson's *New Univ. Cyclop.*, tit. "Stock Exchange," by Strong Wadsworth).

The following account is from Medbery's *Men and Mysteries of Wall Street*, 286: "... when Washington was President, and Continental money was worth a trifle more as currency than as waste paper, some twenty New York dealers in public stock met together in a Broker's office, and signed their names, in the bold, strong hand of their generation, to an agreement of the nature of a protective league. The date of this curious paper is May 17, 1792. The volume of business of all these primitive New York Brokers could not have been much above that of even the poorest first-class Wall Street house in our time. The Revolutionary 'shinplasters,' as the irreverent already styled them, were spread over the land in

It appears that in the beginning, the dealings of the Stock-brokers in this country were confined to speculations in Continental money; but when, in 1812, the United States government issued Treasury notes and negotiated loans to the amount of many millions of dollars, the dealings embraced all these securities, besides operations in the stocks of banks, which were being rapidly formed in all parts of the country. From the year 1820, when the real history of the New York Stock Exchange may be said to have commenced, it has gone on steadily increasing in its members, power, and influence, until to-day it can be safely affirmed to be the most powerful organization of the kind in the world; and by forming a mart where all kinds of securities can be promptly converted into cash, it has largely contributed to the development and wealth of the country by encouraging and sustaining our great railroad systems, which have brought all parts of the Republic into a closer relation to each other, and firmly strengthened the union and prosperity of the States.

such plenty that there were a hundred dollars to each inhabitant. Something was to be made, therefore, from the fluctuations to which they were liable. Indeed, one of the greatest Broker firms of subsequent years derived its capital from the lucky speculations of its senior member in this currency. "The war of 1812 gave the first genuine impulse to speculation. The government issued sixteen millions in Treasury notes, and put loans amounting to one hundred and nine millions on the market. There were endless fluctuations, and the easy-going capitalists of the time managed to gain or lose handsome fortunes. Bank stock was also a favorite investment. An illustration of one of the sources of money-making to Brokers at this period is found in the fact that United States 6's of 1814 were at 50 in specie and 70 in New York bank currency.

"In 1816 one could count up two hundred and eight banks with a capital of \$82,000,000. . . . "One day in 1817, the New York stock-dealers met in the room of an associate, and voted to send a delegate over on the stage line to investigate the system adopted in the rival city. The visit was successful; and the draft of a constitution and by-laws, framed from that of the Philadelphia Board, received the final approbation of a sufficient number of the Brokers to enable the New York Stock Exchange to become a definite fact. Three years after, on the 21st of February, 1820, this preliminary code of rules received a thorough revision, and the organization was strengthened by the accession of some of the heaviest capitalists in the city. Indeed, with 1820, the real history of the Exchange may properly be said to commence."

CHAPTER II.

LEGAL NATURE OF STOCK EXCHANGES; CHARACTER AND INCIDENTS OF MEMBERSHIP THEREIN; AND RULES AND REGULATIONS THEREOF.

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- I. Organization of the New York Stock Exchange.*
- II. General Legal Nature of Unincorporated Stock Exchanges.*
- III. Stock Exchange not a Partnership.*
- IV. Nor a Corporation or Incorporated Joint-stock Association.*
- V. Rights of Members in Property Held by Non-incorporated Stock Exchanges.*
- VI. Liability of Members for Debts, etc.*
- VII. Suits by and against the Stock Exchanges.*
- VIII. Rules and Regulations of Stock Exchanges.*
  - (a.) General Power to Make Rules.*
  - (b.) Power of Suspension and Expulsion.*
  - (c.) Rule Giving Members of Exchange Lien on Proceeds of Defaulting Members, "Seats," etc., in Preference to other Creditors, not Illegal.*
  - (d.) Stock Exchange cannot Take Cognizance of Matters Arising outside of, and Disconnected with, the Purpose of its Organization.*
  - (e.) Members not Bound by Rules which Prevent Recourse to Courts of Law.*
- IX. Liability of "Seats" in Exchanges to Legal Process.*
- X. Gratuity Fund.—Life-insurance.*

*I. Organization of the New York Stock Exchange.*

The New York Stock Exchange is an unincorporated association, and exists under a written constitution and by-laws.<sup>1</sup>

The constitution vests the whole government of the Exchange in forty members, elected in classes, to serve one, two, three, and four years, together with the president and treasurer, making in all forty-two persons, called the "Governing Committee."

All applications for membership are publicly announced by the presiding officer, with the names of the proposer and seconder. Every applicant<sup>2</sup> must be twenty-one years of age; and any wilful misstatement by any applicant for admission, upon a material point, shall, in certain cases, subject the offending party to loss of membership. It is now a prerequisite to admission that an applicant shall be a citizen of the United States.

Neither the Constitution of the New York Stock Exchange nor the Rules and Regulations of the London Stock Exchange, in express terms, state the objects for which those bodies were organized, but they are so manifest that a statement of them has not been deemed essential.

The Constitution and By-laws of the New York Stock Exchange set forth the manner in which the business shall be

<sup>1</sup> The Philadelphia and San Francisco Stock Exchanges are unincorporated associations, organized in substantially the same manner as the N. Y. Stock Exchange. *Vide* Leech vs. Harris, 2 Brews. (Pa.) 575, 576; Hyde vs. Woods, 2 Sawy. 655, aff'd 94 U. S. (4 Otto) Reps. 523. A Stock Exchange by the name of "The New Jersey Stock Exchange" was incorporated by an act of the Legislature of that state, approved March 16, 1875 (L. N. J. 1875, ch. 130). The act does not show where the Exchange was to be located, and no public organization seems to have been effected under it. See also Stat. Indiana (1876, vol. i. ch. 38, §§ 1, 2, and 3), providing for the organization of boards of trade, commercial or real-estate exchanges, chambers of commerce, or other commercial organizations.

<sup>2</sup> Art. X. § 1, Const. N. Y. Stock Exchange.

conducted, the rates of commission to be charged, and the acts or omissions which constitute a ground for dismissing a member. Such of these provisions as are important, and which have been made the subject of legal adjudication, will be particularly noticed hereafter.<sup>1</sup>

## *II. General Legal Nature of Unincorporated Stock Exchanges.*

A voluntary association of persons, like the New York Stock Exchange, by which each individual Broker is enabled to carry on his separate business, under regulations made alike for the protection of himself and his Client or principal, has no technical name or place in the law.

Mr. Justice Daly, in describing an association formerly known as "The Open Board of Stock-brokers,"<sup>2</sup> an organization almost similar to the Stock Exchange, said that it was<sup>3</sup> "an association of persons engaged in the same kind of business, who have organized together for the purpose of establishing certain rules, by which each agrees to be governed in the conduct and management of his separate transactions or business."

So, in describing a similar board in a sister city,<sup>4</sup> the court said: "The Philadelphia Board of Brokers is not a corporation. It is not a joint-stock company, in the sense in which such companies are regarded by the English law, although it has a large amount of property which belongs to it in its joint or aggregate capacity. Such private associations are said not to be partnerships as between themselves, whatever may

<sup>1</sup> Full copies of the Rules and Stock Exchange. *Vide* Preamble to Regulations of the N. Y. and London the Constitution of the latter body. Stock Exchanges will be found in the Appendix.

<sup>2</sup> This body, on the 8th of May, 1869, consolidated with the N. Y.

<sup>3</sup> *White vs. Brownell*, 4 Ab. Pr. (n. s.) 162; s. c. 2 Daly, 329.

<sup>4</sup> *Leech vs. Harris*, 2 Brews. (Pa.) 571.

be their relations to third persons.”<sup>1</sup> The Board of Brokers is a voluntary association of persons who, for convenience in the transaction of business with each other, have associated themselves to provide a common place for the transaction of their individual business, agreeing among themselves to pay the expenses incident to the support of the objects of the association, in which each for himself, at stated hours of the day, and for his individual profit, may prosecute his own business, and enter into separate engagements with his fellow-members. The association does not share in the losses of the individual associates; each member takes his own gains, and individually sustains the losses incident to his engagements.”<sup>2</sup>

These associations have some elements in common with corporations, joint-stock companies, and partnerships.<sup>3</sup>

An institution like the Stock Exchange is an anomaly in the law. It is amphibious in its nature; for, without being either a corporation or a partnership, it possesses some of the characteristics of both. Like a corporation, it has perpetual being; and in this respect it has an advantage over bodies politic, for the charters of the latter generally limit their existence to some definite period; whereas the New York Stock Exchange can preserve its organization (as it has since 1817) until it voluntarily dissolves itself.<sup>4</sup>

### *III. Stock Exchange not a Partnership.*

But the Stock Exchange does not come within the legal definition of a partnership. The general rule undoubtedly

<sup>1</sup> The court cited *White vs. Brownell*, 3 Ab. Pr. (n. s.) 318; *Thomas vs. Ellmaker*, 1 Pars. Cas. (Pa.) 98.

<sup>2</sup> *Leech vs. Harris*, supra; *White vs. Brownell*, 3 Ab. Pr. (n. s.) 318.

<sup>3</sup> *Leech vs. Harris*, supra 575, 576. See also *Hyde vs. Woods*, 2 Sawy. 655, aff'd 94 U. S. (4 Otto), 523.

<sup>4</sup> See also *Thompson vs. Adams*, Sup. Ct. Pa. 7 Week. Notes of Cas. 281.

is that "no partnership or *quasi* partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners. Societies and clubs, the object of which is not to share profits, are not partnerships, nor are their members, as such, liable for each other's acts."<sup>1</sup>

The Stock Exchange exists under an agreement between its members to pay the expenses incident to the support of a "Mart," in which each for himself, at stated hours of the day, and for his individual profit, may prosecute his own business, and enter into separate engagements with his fellow-members. The association does not share in the losses of the individual associates; each member takes his own gains, and individually sustains the losses incident to his engagements. The organization of this board grew out of a necessity for new and greater facilities for exchange and negotiation, incident to the rapidly developing interests of the country and the increasing number and value of its commercial securities.<sup>2</sup>

Although it may possess property derived from the payment of dues or fines, such property is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing.<sup>3</sup>

There are no profits earned to be divided among its members, nor are there any losses to be borne arising out of the acts of the joint body. If a partnership, the death of one of its members would, *ipso facto*, dissolve it.<sup>4</sup>

In the case of *Caldicott vs. Griffiths*,<sup>5</sup> it was held that a

<sup>1</sup> Lindley on Part. (3d ed.) 57.

<sup>2</sup> Van Vorst, J. in *White vs. Brownell*, 3 Ab. Pr. (n. s.) 318.

<sup>3</sup> Daly, F. J. in *White vs. Brownell*, 4 Ab. Pr. (n. s.) 191.

<sup>4</sup> *White vs. Brownell*, 3 Ab. Pr. (n. s.) 325. 1 Lindley on Part. (3d ed.) 57. See also discussion as to the nature of unincorporated associa-

tions, *Thomas vs. Ellmaker*, 1 Pars. Cas. (Pa.) 98; *Fleming vs. Hector*, 2 M. & W. 172; *Regina vs. Whitmarsh*, 15 Q. B. 600; *Bear vs. Bromley*, 18 id. 271. See also recent case of *Ash vs. Guie*, 11 Pitts. L. J. (Pa.) n. s. 449; s. c. Alb. L. J. July 30, 1881, 83.

<sup>5</sup> 8 Ex. 898.

society called "The Midland Counties Guardian Society for the Protection of Trade," the professed object of which was to "watch the progress of any measure in Parliament affecting the trade interests, and to protect its members from the practices of the fraudulent and dishonest," and which was organized with a president, vice-president, treasurer, secretary, and committee—to which committee was given the general management of the affairs of the society, and which society was organized under a series of rules adopted for the management of the same—was not a partnership; and that, therefore, one of the members of the society who had furnished certain printing to the committee might sue the committee; and that the principle that one partner cannot sue the partnership did not apply.

In the argument, the defendants referred to a case<sup>1</sup> which held that the promoters of a railroad company constituted a partnership, as showing that a partnership existed in the case before the court. The court, in reaching its conclusion, said: "The question is, whether, by entering into this scheme, the subscribers form a partnership or a *quasi*-partnership; or whether the case is similar to that of a number of persons subscribing to a hospital or to an ordinary club. The solution of that question is not to be arrived at by examining cases which have reference to the liability of committee-men or shareholders in projected railway companies, and in other undertakings of that description, but by consulting the rules themselves."

Yet unincorporated associations are, in law, often regarded as mere partnerships.<sup>2</sup>

<sup>1</sup> Holmes vs. Higgins, 1 B. & C. 74. wood's Case, 23 Eng. L. & Eq. 422; Wells vs. Gates, 18 Barb. (N. Y.) 557;

<sup>2</sup> Robbins vs. Butler, 24 Ill. 397; Butterfield vs. Beardsley, 28 Mich. 412; Moore vs. Brink, 4 Hun (N. Y.), 402. Bullard vs. Kinney, 10 Cal. 60; Coal Co. vs. Fry, 4 Phil. (Pa.) 129; Green-



#### *IV. Nor is the Stock Exchange a Corporation or Incorporated Joint-stock Association.*

It does not exist by virtue of a charter or legislative grant.

The obligations and rights of its members are not determined by any statutory provision.<sup>1</sup> There is no contribution of capital by its members for the prosecution of any kind of business by the association. It issues no stock, nor can the individual members claim any rights of property in it as stockholders.<sup>2</sup>

Unlike an incorporated commercial joint-stock company, the privilege of membership in such a voluntary association may be conferred or withheld, at its pleasure, and the law cannot compel the admission of an individual into the society against its wish.<sup>3</sup>

The above are some of the general elements which distinguish stock exchanges from corporations, incorporated joint-stock associations, or partnerships, and these distinctions will be further developed in the ensuing subdivisions of this chapter.

#### *V. Rights of Members in Property Held by Non-incorporated Stock Exchanges.*

In respect to the property which the Stock Exchange may, from time to time own, interesting questions are involved in which the distinction between this body and corporations and partnerships will further appear.

As has been shown, the Exchange is in no wise interested

<sup>1</sup> A voluntary unincorporated joint-stock company is, however, visors of N. Y., 15 How. Pr. (N. Y.) 172.

liable to be taxed on its capital, as a corporation, under the laws of New York. <sup>2</sup> White vs. Brownell, 3 Ab. Pr. (n. s.) 318. <sup>3</sup> Id. 4 Ab. Pr. (n. s.) 162.

in the pecuniary gains or profits of its members; and the sole source of its revenue is derivable from such dues, fines, assessments, or contributions as it may, from time to time, collect or receive from its members, together with any increase of its present accumulations.

At common-law, the legal title of the personal property of the Exchange, it being unincorporated, is vested in all of its members, in like manner as the title to partnership property is vested in all the partners. But, unlike the relation of partners, a member of the Exchange, or his legal representatives, has no right to call for an account of the property and a division of the same.

A member has no several proprietary interest in it, or a right to any proportionable part of it, upon withdrawing. He has merely the enjoyment and use of it while he is a member; but the property remains with, and belongs to, the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation, and not in the pewholder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets.<sup>1</sup>

This principle arises mainly from the fact that organizations of this character are not constituted for *gain*, but for the *convenience* of their members, and the possession of property by them is a mere incident, and not the main purpose or object of the association.<sup>2</sup>

When a person is elected a member of the Exchange, he becomes entitled to what is commonly called a "seat," and such a proportionate interest in the property of the association as he would be entitled to if he should happen to be a member at the time of its dissolution; and that interest would

<sup>1</sup> *St. James's Club*, 13 Eng. L. & Parish in *Boyleston*, 19 Pick. 361; *Eq.* 592; *White vs. Brownell*, 4 Ab. *Caldicott vs. Griffith*, 8 Ex. 898. *Pr. (n. s.)* 162-191; *Fassett vs. First*    <sup>2</sup> *White vs. Brownell*, *supra*.

be found by dividing the amount of property by the number of "seats" then existing after deducting debts and liabilities. These "seats," under the 13th Article of the Constitution of the Exchange, are transferable, but the transferee must be approved by two thirds of the Committee on Admissions. The transfer, sale, or assignment of the interest of a partner would work a dissolution of the partnership.<sup>1</sup> In the present instance, however, the transferor, by such an act, does not disturb or affect the general organization; he simply ceases to be a member and to have any legal interest or concern in the Exchange, and the transferee becomes invested with all of the privileges, duties, and attributes of membership. When a member dies, his membership may be disposed of by the Committee on Admissions; and, after satisfying claims of the members, the balance remaining is paid to the legal representatives of the deceased. If the Committee on Admissions should, for even arbitrary reasons, refuse to approve a person to whom a member has bargained to sell his seat, it follows that the latter is forced to continue his membership. By signing the Constitution each member agrees to the same, and to all the by-laws, rules, or regulations which may be adopted (provided they are legal, as we shall hereafter see); and thus a contract is expressly established, by which the ordinary principles that govern the relations of partnerships and corporations are avoided.

As to any real estate which the Exchange may acquire, the questions which would ordinarily arise in relation thereto are more difficult and numerous. Their property being, as we have seen, technically held by them as partners, it follows that the persons who are members, when they acquire lands are vested with equal interests therein; and that the Stock Exchange at common-law, being an unincorporated body, could confer no

<sup>1</sup> Pars. on Part. (3d ed.) 433, 434; 1 Lindley on Part. (4th ed.) 698.

title upon a purchaser unless all of its members joined in the conveyance; or, if any of them were deceased, the heirs of such of them as were members at the time the real estate vested in the Exchange.

To avoid the many questions of the above nature which doubtless would have arisen if real estate were held by the Exchange, a company was incorporated under the laws of the State of New York,<sup>1</sup> duly empowered to hold real estate, the stock of the company being exclusively owned and held by the Stock Exchange.

And there is now a general law in the State of New York authorizing any joint-stock company or association to purchase, hold, and convey real estate: 1st, To an extent necessary for its immediate accommodation in the convenient transaction of its business; 2d, Such as shall be mortgaged to it in good faith, to secure loans made by or moneys due to it; or, 3d, Such as it shall purchase at sales under judgments, decrees, or mortgages held by it; but in no other case, nor for any other purpose.

Conveyances shall be made to the president of the association, as such, and he and his successors may sell, assign, and convey, free from any claim of shareholders, or any person claiming under them.<sup>2</sup>

This act may be construed as a restraint upon the right of joint-stock associations to purchase and hold real estate not needed for immediate use. Such seems to have been the construction given to it in *Rainey vs. Laing*.<sup>3</sup> But if the statute is violated in this respect, no one can question the title but the State.<sup>4</sup>

<sup>1</sup> Incorp. Jan. 30, 1863.

<sup>2</sup> L. of N. Y. 1867, vol. i. ch. 239, 576.

<sup>3</sup> 58 Barb. 489.

<sup>4</sup> Id.; *Howell vs. Earp*, 21 Hun (N. Y.), 393. Aside from the statute

just quoted, it is a question whether, in view of the fact that the members of the Exchange are partners, in some aspects, a grant to the Stock Exchange would be valid. It has been held that a community or so-

## *VI. Liability of Members for Debts, etc.*

Another question which arises, in considering the nature of an unincorporated association like the Stock Exchange, is as to the individual liability of the members thereof, *ex contractu* or *ex delicto*, for the acts of its officers, committees, representatives, or of their fellow-members.

The general rule is, that members of unincorporated companies are regarded as partners, and are subject to the whole law of partnerships.<sup>1</sup> But the application of this principle to a body like the Stock Exchange is very restricted. No case seems to have occurred which is expressly decisive of the personal liability of members of a Stock Exchange; but

ciety, not incorporated, cannot purchase land and take in succession. Co. Litt. 3 a. 10 Co. 266, Com. Dig., tit. Capacity, B. 1; Jackson vs. Cory, 8 Johns. (N. Y.) Reps. 385; Hornbeck vs. Westbrook, 9 id. 73; same vs. Sleight, 12 id. 198. In this last case it is said: "The inhabitants of Rochester were not a body corporate, so as to be competent to take an estate in fee. And if a grant to them in a deed would be void, a reservation to them in a deed, in fee, to a third person would be equally void. Nor would it be valid as a covenant to stand seised. The inhabitants of Rochester were strangers to the deed. The present inhabitants, at all events, must be so considered. For they not being a body corporate so as to perpetuate the rights granted to the patent, these rights must be restricted to the then inhabitants." But see Ticknor's Est., Sup. Ct. Mich., 4 Am. Law Reg. (n. s.) 269 note; Hamblett vs. Bennett, 88 Mass. 140; East Haddam Bapt. Ch. vs. East Haddam Bapt. Soc., 44 Conn. 259. So a voluntary unincorporated association for charitable purposes

cannot take property by devise in the State of New York. White vs. Howard, 46 N. Y. 144, aff'g 52 Barb. 294; Sherwood vs. American Bible Society, 1 Keyes (N. Y.) 561, 567; Owens vs. Missionary Society, 14 N. Y. 380; Downing vs. Marshall, 23 N. Y. 366; McKeon vs. Kearney, 57 How. Pr. (N. Y.) 350; Contra, Hornbeck vs. Am. Bible Soc., 2 Sandf. Ch. 133. Nor can such an association take a bequest, although subsequently to the death of the testator it becomes incorporated. Baptists' Association vs. Hart's Executors, 4 Wh. (U. S.) 1; 3 Pet. 497; see also 2 Redf. on Wills, ch. i. § 7. That a bequest to such an association may be valid or be made to take effect indirectly, see Preacher's Aid Society vs. Rich, 45 Me. 552; Cahill vs. Bigger, 8 B. Mour. (Ky.) 211; Smith vs. Nelson, 18 Vt. 511, 546; Peabody vs. Eastern Methodist Soc., 87 Mass. 540; Gibson vs. McCall, 1 Rich. (S. C.) Rep. 174.

<sup>1</sup> Pars. on Part. (3d ed.) 588; Wardsworth on Joint-stock Companies, 21, 220.

there are very many instances in the books in which members of clubs and other associations have been sought to be charged as individuals, for acts of committees, etc., and which would doubtless control a case of the former character, if it ever should arise. For the acts of its officers or servants, directly authorized by the constitution, laws, or regulations of the Stock Exchange, its members would be individually liable under the general principle above cited.

But the great contention has arisen in those cases where the officers or servants have contracted obligations or incurred liability, without any direct or express authorization from the association. This question seems to have been determined, in the modern cases, by the law of principal and agent rather than that of partnership. Mr. Lindley says on this subject: "If liabilities are to be fastened on any of their members, it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."<sup>1</sup>

This question is, at present, entirely speculative, and there can be no practical use in discussing it at any length, but a collection of modern authorities upon the general subject will be found below.<sup>2</sup>

<sup>1</sup> 1 Lindley on Part. (4th ed.) 57.

<sup>2</sup> 2 Lindley on Part. 57, note (d) and cases cited. See, also, Wardsworth on Joint-stock Companies, ch. viii. and cases cited; Pars. on Part. (3d ed.) 45, note (b); Ebbinghausen vs. Worth Club, 4 Ab. New Cas. (N. Y.) 300, and note, where a full discussion of this subject is made; Park vs. Simmons, 10 Hun

(N. Y.), 128, which seems to be contrary to the majority of the cases on this subject, and is expressly repudiated by Ebbinghausen vs. Worth Club (supra); Lafond vs. Deems, 1 Ab. New Cas. 318; 81 N. Y. 507. As to the question of liability of members of a club for negligence in the management of their property, see English vs. Brennan, 60 N. Y. 609; 2 Hilliard on Torts, 230.

## *VII. Suits by and against the Stock Exchange.*

At common law, carrying out the analogy between unincorporated bodies and partnerships, in a suit by or against the former, it was necessary that all persons composing the same should be made parties.<sup>1</sup>

But the Legislature of the State of New York, by the act of 1849, ch. 258, has provided that any joint-stock company or association, consisting of seven or more stockholders or associates, may sue and be sued in the name of the president or treasurer, for the time being, of such joint-stock company or association.<sup>2</sup>

This provision, not being deemed broad enough, was extended by the Laws of 1851, ch. 455, to any company or association composed of not less than seven persons who are owners of, or have an interest in, any property, right of action or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest.<sup>3</sup>

The New York statute provides that where an association

<sup>1</sup> Ang. & Ames on Corp. (10th ed.) § 591, 599; Williams vs. Bank of Michigan, 7 Wend. 542; Wells vs. Gates, 18 Barb. (N. Y.) 554; Dicey on Parties, 170, 172 (Truman's notes); East Haddam Bapt. Ch. vs. East Haddam Bapt. Soc. 44 Conn. 259; Haskins vs. Alcott, 13 Ohio St. 216.

<sup>2</sup> Whether this act extends to private voluntary copartnerships or associations, which are not organized in pursuance of some statute, was questioned in Austin vs. Searing, 16 N. Y. 112; and in Rorke vs. Russell, 2 Lans. Rep. (N. Y.) 244; see also Ebbinghausen vs. Worth Club, 4 Ab. New Cas. 300.

<sup>3</sup> By the laws of Pennsylvania, in the case of joint-stock companies,

unincorporated, when the members of said companies do not reside within the commonwealth, process may be served upon any officer, agent, etc. Brightly's Purd. Dig. vol. i. 42. By the Rev. Stat. of Ohio, § 5011, a partnership formed for the purpose of carrying on a trade or business in that State, or holding property therein, may sue or be sued by the usual or ordinary name which it has assumed, or by which it is known; and, in such case, it shall not be necessary to allege or prove the names of the individual members thereof. The above statute only applies to companies doing business within the State. Haskins vs. Alcott, 13 Ohio St. 216.

consists of more than seven members, the action may be brought in the name of the president,<sup>1</sup> and this provision has been held to extend the remedy to all associations.<sup>2</sup>

The statute applies to the remedy, and the *lex fori* governs. It is not confined to associations of the State of New York, but applies to all associations which come into court under it. Where the statute provides a remedy, it extends to all persons who use it, unless the act, by its terms, expressly limits its application.<sup>3</sup>

In the case of *Rorke vs. Russell*,<sup>4</sup> it was held that the above-recited statutes were passed for the purpose of facilitating a certain class or kind of legal actions, relating to, or by which a remedy is sought as regards, the "joint property and effects" of the company or association; and that where, in an action against the President of the New York Mining Stock Board, the only relief asked for was that the president of the board, its officers and members, should be restrained from enforcing the vote or resolution of the board, suspending the plaintiff from his membership for a certain number of days, it was held that the action was not within either of these statutes; that plaintiff could not bring a suit against the president

<sup>1</sup> 3 N. Y. Rev. Stat. (6th ed.) 762.

<sup>2</sup> *Bridenbecker vs. Hoard*, 32 How. Pr. (N. Y.) 289; *Tibbetts vs. Blood*, 21 Barb. 650; *Corning vs. Greene*, 23 id. 33; *De Witt vs. Chandler*, 11 Ab. Pr. (N. Y.) 459, 470; *National Bank vs. Lasher*, 1 T. & C. (N. Y.) 313; *Waller vs. Thomas*, 42 How. Pr. (N. Y.) 346; *Ebbinghausen vs. Worth Club*, 4 Ab. New Cas. 300; *Allen vs. Clark*, 65 Barb. 563; *National Bank vs. Van Derwerker*, 74 N. Y. 234; and see 4 Duer, 362; 18 Ab. Pr. 191; 55 Barb. 487. So an action may be brought in the name of the president, to recover calls from shareholders. *Bray vs. Farwell*, 3 Lans. (N. Y.) Rep. 495. So a member of a

joint-stock association may maintain an action against such association. It is not an action against himself. *Westcott vs. Fargo*, 61 N. Y. 542; *Saltsman vs. Shults*, 14 Hun (N. Y.), 256; see *McMahon vs. Rauhr*, 47 N. Y. 67; *Snow vs. Wheeler*, 113 Mass. 179. But see *Bullard vs. Kinney*, 10 Cal. 60; *Coal Company vs. Fry*, 4 Phil. (Pa.) 129; *Wilson vs. Curzon*, 15 M. & W. 532; *Perring vs. Hone*, 4 Bing. 28; *Holmes vs. Higgins*, 1 B. & C. 74.

<sup>3</sup> See also N. Y. Code of Civil Proc. § 448, allowing one to be sued, where a large number of persons are interested.

<sup>4</sup> 2 Lans. (N. Y.) 245.



alone ; that such a suit could not be regarded as a suit against the company or board ; that no member of the latter would be regarded as a party to it ; and that, accordingly, an injunction could not be regularly issued against any one else than the president.

This construction seems too narrow, and it was dissented from by one of the justices ; but, although the decision does not appear to have been expressly overruled, subsequent cases would seem to show that it has not been followed as a precedent.

And in the recent case of *National Bank vs. Van Derwerker*,<sup>1</sup> where the defence was, that to bring a case within the statute in question it was necessary to show the existence of a company having stock divided into shares, and shareholders holding the same, the court held that the statute required no greater formalities in that respect for the formation of such associations than for the formation of ordinary partnerships. In that case it appeared that an association existed which had adopted for its title the *Old Saratoga Union Store Association*. It had more than fifty members, but there were no written articles signed by the members, nor any articles of incorporation, except a constitution and by-laws. There were also a president and board of directors. The president of the association, under authority of the body, made certain promissory notes. In an action on these notes, the court held that the suit was properly brought against the association, in the name of the president ; and that judgment in such an action, and execution thereon, bound the joint property of the association, and not the individual property of the president.

In the cases cited in the notes, suits were instituted against the Stock Exchange in the name of its president ;<sup>2</sup> and in the

<sup>1</sup> 74 N. Y. 234.

<sup>2</sup> *Heath vs. Prest. Gold Exchange*, N. Y. Superior Ct., Sp. T., unreported, 7 Ab. Pr. (n. s.) 251 ; s. c. 38 How. Pr. 168 ; *White vs. Brownell*, 3 Ab. Pr. 318 ; 4 id. 162 ; *Sewell vs. Ives*, N. Y. Superior Ct., Sp. T., unreported, N. Y. *Daily Reg.*, Feb. 11, 1879 ; *Rorke vs. Russell*, 2 Lans. (N. Y.)

State of New York, under the statutes in question, there appears to be no legal impediment to the bringing of a suit against the Stock Exchange in the name of the president, treasurer, or other officer named in the act.<sup>1</sup>

In the case of *Rorke vs. Russell*, above referred to,<sup>2</sup> it was held, by Mr. Justice Ingraham, that where an injunction was issued and served on the defendant, in an action against the president of an association which purported to restrain him "as president" of the association, "its officers and members," the associates to whom the service was made known, and the summons, complaint, and order were read, at a meeting of the association, by its officers acting thereat, were amenable for contempt in taking proceedings contrary to the prohibitions of the injunction.

The New York statute further provides that after judgment shall be obtained against any joint-stock company or association, and execution thereon shall be returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates, individually; but no more than one suit shall be brought or maintained against said shareholders at any one time, nor until the same shall have been determined, and execution issued and returned unsatisfied, in whole or in part.<sup>3</sup>

The effect of these statutes permitting an unincorporated as-

Rep. 244. In the case of *Sewell vs. Ives* the question was directly raised, and the form of the action against the President of the Stock Exchange sustained, under the aforementioned act. See also *Sewell vs. Ives*, Prest. N. Y. Superior Ct., Sp. T., N. Y. *Daily Reg.*, May 18, 1881. Also, *Olery vs. Brown*, 51 How. Pr. (N. Y.) 92.

<sup>1</sup> For other cases, interpreting the statutes of 1849 and 1851, see *Schmidt vs. Gunther*, 5 Daly, 452. Also cases cited in note to *Ebbinghausen vs. Worth Club*, 4 Ab. New Cas.

311; *Tibbetts vs. Blood*, 21 Barb. 650; *De Witt vs. Chandler*, 11 Ab. Pr. 459; *Bridenbecker vs. Hoard*, 32 How. Pr. (N. Y.) 289; *Austin vs. Searing*, 16 N. Y. 112; *Masterson vs. Botts*, 4 Ab. Pr. Rep. 130; *N. Y. Marble Iron Works vs. Smith*, 4 Duer (N. Y.) 362; *East River Bank vs. Judah*, 10 How. Pr. 135; *Leonardville Bank vs. Willard*, 25 N. Y. 574; *People vs. Olmsted*, 45 Barb. 644, 647.

<sup>2</sup> 2 Lans. (N. Y.) Rep. 245.

<sup>3</sup> Laws 1849, ch. 256, § 4; as amended, L. 1853, ch. 153.

sociation to sue and be sued in the name of one or more of its officers, has been to remove another great objection to such organizations, and to make them equal in dignity and efficacy to corporations.

In Pennsylvania, the first case which seems to have arisen, involving a question between the Philadelphia Stock Exchange and its members, was that of *Leech vs. Harris*.<sup>1</sup> There a bill was filed to prevent the plaintiff from being suspended as a member of the Exchange. In that case, a committee of the Exchange was appointed by the president to investigate a certain claim against the plaintiff. Apprehending that the committee would suspend him, the plaintiff asked for an injunction. The action was brought against the members of the committee as a "Committee and Members of the Board of Brokers," and no objection seems to have been taken to this form of the action, the injunction being granted preventing the plaintiff's expulsion.

In another case,<sup>2</sup> the action was brought against the "Treasurer of the Board of Brokers and the Philadelphia Board of Brokers;" and in a previous case, *Leech vs. Leech*,<sup>3</sup> "the Board of Brokers" were made garnishees.

So in the very recent case of *Moxey's Appeal*, decided by the Supreme Court of Pennsylvania in January, 1881,<sup>4</sup> where the action was, in equity, to restrain defendants, *inter alia*, from interfering with plaintiff's right and privilege of using his seat in the board, the bill was filed against "The Philadelphia Stock Exchange, A. B., president thereof."<sup>5</sup>

In view of these authorities, there would seem to be no

<sup>1</sup> 2 Brews. (Pa.) 571.

<sup>3</sup> Id. 542, note.

<sup>2</sup> *Singerly vs. Johnson*, 3 Weekly Notes Cas. (Pa.) 541, 542, and see *Leech vs. Leech*, id. 542, where a suit was brought against "The Board of Brokers," garnishees. Also *Evans vs. Wister*, *infra*.

<sup>4</sup> 9 Weekly Notes Cas. 441, aff'g 37 Legal Int. 82.

<sup>5</sup> See also *Evans vs. Wister*, 1 Weekly Notes Cas. 181.

difficulty, in the State of Pennsylvania, in maintaining an action against the Exchange as a body, without joining the individual members.<sup>1</sup>

There seems to be no statute in Massachusetts providing for the bringing of actions by or against voluntary associations, in the name of their officers or otherwise. Nor are there any laws declaring the status or regulating the management of such bodies. But such associations have been recognized as legal, and suits have been brought against, and in the name of, their trustees. But the actions were brought in respect to contracts made with trustees, by name, and their successors, of such associations.<sup>2</sup>

There is another class of cases which should be referred to in this connection, viz., where instruments are given to unincorporated associations whereby money is secured and made payable to some officer of the company and his "*successors in office*." A number of the English cases hold that effect cannot be given to such an instrument, it being an attempt to provide for payment to official successors; that it is in law constituting the officer a corporation sole, which cannot be done by agreement, but must be done by the crown.<sup>3</sup>

<sup>1</sup> See ante, p. 23, n. 3, for statute of Pennsylvania relating to suits against unincorporated associations where the members reside outside of the State. In the case of *Kurz vs. Eggert* (9 Weekly Notes Cas. 126), the plaintiff brought an action of assumpsit against the president, a trustee, and the treasurer of The Augusta Teutonia Lodge, No. 34 Deutsche Order of Hamgari, an unincorporated beneficial association, to recover the amount to be paid during the sickness of plaintiff. The defendant demurred, on the ground that plaintiff could not maintain an action at law against the officers of the association. The court held that, notwith-

standing the act of April 28, 1876 (P. L. 53 Purd. Dig. 1981), declaring that such benefits shall be paid from the treasury only, such associations still continue to be partnerships, and that the action was improperly brought.

<sup>2</sup> *Merrill vs. McIntyre*, 13 Gray, 157; *Baxter vs. McIntyre*, 13 Gray, 168; *Delano vs. Wild*, 6 Allen, 1.

<sup>3</sup> *Dance vs. Girdler*, 4 B. & P. 40; *Strange vs. Lee*, 3 East, 484; *Graves vs. Colby*, per Lord Denman, 9 Ad. & E. 356; *Metcalf vs. Bruin*, 12 East, 400; also, 2 Camp. 422; *Pigott vs. Thompson*, 3 B. & P. 147; but see this latter case explained in *Bowen vs. Morris*, 2 Taunt. 381; *Hybart vs.*

In such a case, it would seem that the right of action at common-law (unless affected by statute) on a contract made with several persons jointly passes on the death of each to the survivors, and, on the death of the last, to his representatives.<sup>1</sup>

In the United States, however, the law, in some of the States, is different; and it is held that the right to sue exists in the subsequent incumbent of the office; at all events, where the engagement or undertaking is for the benefit of some public or quasi-public body.<sup>2</sup>

There have been some decisions, as to the effect of the recovery of a judgment against these non-incorporated associations, which it may not be amiss to refer to in this connection.

Where a judgment is recovered against the president of an association for a debt owing by the latter, it does not preclude individual members, when sued for the same debt, from contesting their liability for the debts of the association.

A suit against the president is necessary, in the first instance, by the express terms of the statute, before an action against the members can be maintained; but the judgment therein is only so far effective as to reach the property owned by the association: when it fails to secure satisfaction of the debt, then an action against the associates directly to enforce the payment of the debt out of their own individual property is proper.

At most, a judgment against the president can be no more than *prima facie* evidence in the plaintiff's favor in a subsequent action against the associates. It will not sustain his right to recover, where the evidence shows that the judgment

Parker, 4 C. B. (n. s.) 209; Gray vs. Pearson, 5 L. R. C. P. 568; Evans vs. Hooper, L. R. 1, Q. B. D. 45; Howley vs. Knight, 14 Q. B. 240.

<sup>1</sup> Dicey on Parties, 128.

<sup>2</sup> *Fishe vs. Ellis*, 20 Mass. 532; *Kean vs. Franklin*, 5 Serg. & R. 154; *Commonw. vs. Shurman's Adm.* 18 Pa. St. (6 Har.) 347.

so recovered exceeds the amount for which the association or its members were liable in the action.<sup>1</sup>

The statutes of New York also provide that whenever the property of a joint-stock association is represented by shares of stock, such association may provide, by articles of association, that the death of any stockholder, or assignment of his stock, shall not work a dissolution of the association; nor shall said company be dissolved, except by judgment of a court, for fraud in its management, or other good cause to such court shown, or in pursuance of its articles of association.<sup>2</sup>

Under this section it has been decided, in the State of New York, that a dissolution of a joint-stock company is to be conducted mainly according to the methods employed in the case of insolvent corporations, and not according to those derived from the law of simple partnerships.<sup>3</sup>

The causes for which the courts will dissolve such bodies are either those for which a dissolution is specifically provided in the constitution, or, where that instrument is silent upon the subject, a dissolution will be decreed in the same cases as a corporation.<sup>4</sup>

There is no provision in the constitution or by-laws of the New York Stock Exchange relative to its dissolution; and

<sup>1</sup> *Allen vs. Clark*, 65 Barb. 563; *Witherhead vs. Allen*, 4 Ab. (N. Y.), App. 628, reversing 23 Barb. 661; *Kingsland vs. Braisted*, 2 Laus. 17; *Robbins vs. Wells*, 1 Robt. (N. Y.) 666.

<sup>2</sup> Laws 1854, ch. 245.

<sup>3</sup> *Waterbury vs. Mer. Union Ex. Co.* 50 Barb. 157, s. c. 3 Ab. Pr. (n. s.) 163.

<sup>4</sup> There are some reported cases where the courts have been asked to dissolve these unincorporated associations, and it might not be unprofitable to refer to a few of them in this connection.

Thus it has been held that in case

of violent dissensions and irreconcilable differences between the members of a voluntary association judgment will be rendered at the suit of one or more members against all the others dissolving the society; but they should not be dissolved for slight causes, and, if at all, only when it is entirely apparent that the organization has ceased to answer the ends of its existence and no other mode of relief is attainable.

*Lafond vs. Deems*, 1 Ab. New Cas. (N. Y.) 318; 81 N. Y. 507; *Fischer vs. Raab*, C. P., Sp. T., N. Y. *Daily Reg.* Feb. 10, 1879.

were the period to arrive when its dissolution should be asked for, the question would probably be determined by the statutes above referred to, together with such cases as have been decided under them.

Under the present laws of the Stock Exchange of New York, there would appear to be little difficulty in dividing its property if a dissolution were to take place. By dividing the property by the number of seats, the result would clearly appear. But as there has arisen considerable dispute upon the dissolution of voluntary societies, a number of cases are collected in the notes which show upon what principle and by what methods the court directs a distribution in those instances where the regulations or laws of the associations have left the matter unsettled or in doubt.<sup>1</sup>

<sup>1</sup> In *Brown vs. Dale* (27 *W. R.* 149), in the chancery division of the English Court, the Master of the Rolls held that where a voluntary society has a fund—in this case arising on the sale of some of their real property—there being no rule of the society nor any express obligation to the contrary, the members, at a given time, were entitled to divide the fund among themselves; hence, that new members coming in after such a determination, though before actual division, could not share, nor insist that the fund be invested and only income divided.

A minority have the right to enjoin the majority from distributing the funds among the members in a manner different from that provided by the constitution without a vote, according to the constitution, to make the necessary alteration. So held in the case of a benefit society, although for fifty years there had never been a call for relief upon the society pursuant to its articles, and the fund was the accumulation of voluntary assessments, all made more than forty

years before the suit (*Torrey vs. Baker*, 83 *Mass.* 120).

Where a sale and distribution of the property in a certain period is positively provided for by private articles of association, any of the shareholders have a right to insist upon the sale and distribution according to the articles, though it may not be for the interests of the concern, or may be against the will of the majority (*Mann vs. Butler*, 2 *Barb. Ch.* 362).

A club formed for the purpose of relieving its members from draft, provided that the sum of \$300 should be paid to every member who should volunteer or put in a substitute. The funds of the association were paid by its treasurer to the defendants, who were not members, upon the agreement that they would fill the quota of the whole township. The plaintiff, a member of the club, was drafted, and put in a substitute. Held, that the fund passed to the defendants, covered with a trust to pay it according to the terms of the subscription; that they stood in the

*VIII. Rules and Regulations of Stock Exchanges.**(a.) General Power to Make Rules, etc.*

By the 21st Article of the Constitution of the New York

position of the club; and that the plaintiff was entitled to his share of the fund (*Foley vs. Tovey*, 54 Pa. St. 190).

Divers persons subscribed various sums to assist an unincorporated musical association to erect a building for their use as a band. Held, that these subscriptions were absolute gifts to the members of the association, and that the building erected by means of them and of funds otherwise obtained was owned by the members as tenants in common (*Higgins vs. Riddell*, 12 Wis. 587).

An agreement under seal that "we, the owners in the R farm, hereby agree to any division of the remaining portion of said farm unsold, which a majority of interest in said property shall decide upon as fair and equitable." Held to refer to the mode of division, and not to authorize the majority in interest to set off to any owner a certain portion of the land without his assent (*Harkness vs. Remington*, 7 R. I. 154).

An association was formed for the purpose of obtaining gold in California. By the articles each agreed to pay \$25 to furnish an outfit for, and to pay the expenses of, eight of their number, to be elected by the members to go to California and labor for the association in procuring gold; and that from the products of their labor their expenses should be first paid, and of the residue one half should be divided among the eight and the remainder among all the members. The eight, on arriving in California, sold their outfits, divided the proceeds, and each one took his own way. One of the eight returned to Ohio, and a bill

was filed to compel him to account. Held, that the eight members of the association stood in relation thereto of employes, and that their acts, on arriving in California, did not discharge them from any of their obligations to it (*Eagle v. Bucher*, 6 Ohio St. 295).

B was a member of the "Cheshire Company," and A and B advanced \$500 each, which was paid by B as his contribution thereto, with the agreement that they should share in certain proportions the profits of the enterprise, and that the directors of the company might retain A's share as his attorneys. B sold his interest therein at an advance of \$1000 before the company realized any profits to the other members. Held, that A was entitled to receive his stipulated portion of that advance as profits (*Richardson vs. Dickinson*, 26 N. H. (6 Fost.) 217).

A, the owner of a share of the outfit of a California gold company, sold to B "one half of his interest in the company;" but the writing provided that B should not be a partner in the company, but only "purchaser of A's interest in the metals and ores" that might be obtained. Held, that B acquired no interest in the outfit (*Phillips vs. Jones*, 20 Mo. 67).

The defendants, owners of mineral lands, entered into a written agreement with the plaintiff, reciting their intention either to sell the lands or to form a joint-stock company for the working of the mines thereon; and promising, in consideration of services rendered and to be rendered by the plaintiff, to pay to him a cer-



Stock Exchange,<sup>1</sup> every member is required, within five days after his admission, to sign the constitution and by-laws, and pledge himself to abide by the same, and all amendments and all existing or future rules or regulations.

The general effect of a rule like the above will be first considered, and afterwards reference will be made to such particular rules as are important, or have been made the subject of legal interpretation.

It is well settled that before a member of an unincorporated association is bound by the constitution and by-laws of a society, it must appear that he personally assented to the same.<sup>2</sup> This assent, however, need not necessarily be based upon an actual signing of the by-laws or rules, but it may be inferred or presumed from the circumstances of each case, and especially from the fact of admission and acting as a member.<sup>3</sup> And it seems that where an association, through a committee or otherwise, seeks to suspend or expel a member for acts not provided for in the by-laws or constitution, or by an *ex post facto* resolution, the courts will interfere by injunction to prevent the same.<sup>4</sup> So a member of a Stock Exchange

tain sum out of the proceeds of the sale of the lands, if the same should be sold, or, if they should not be sold, and a company should be formed for working the mines, then to convey to him stock to that amount; and the plaintiff, on his part, agreed, in consideration of the foregoing agreements, to remain in their service as long as they might require, not exceeding one year, for a fixed salary and a house and land free of rent. Held, that the defendants were not bound to sell the land, nor to form a joint-stock company, until by using reasonable efforts it should be for the mutual interest of all the parties concerned; and where, without negligence on their part, they had failed to do so, although more than seven

years had elapsed, that the plaintiff has no claim upon them in equity, except for the stipulated salary (Pinch vs. Anthony, 10 Allen (Mass.) 470).

<sup>1</sup> As amended, June, 1876.

<sup>2</sup> Austin vs. Searing, 16 N. Y. 112; Heath vs. Prest. Gold Exchange, 7 Ab. Pr. (n. s.) 251.

<sup>3</sup> Innes vs. Wylie, 1 Car. & K. 262; Brancker vs. Roberts, 7 Jur. (n. s.) 1185; Hopkison vs. Marquis of Exeter, 5 L. R. Eq. 63; Inhabitants of Palmyra vs. Morton, 25 Mo. 593; White vs. Brownell, 4 Ab. Pr. (n. s.) 162, 193.

<sup>4</sup> Per Ingraham, J., Rorke vs. Russell, 2 Lans. (N. Y.) Rep. 244, 248. The adoption, by an unincorporated society, of a new constitution is ille-

is bound by a by-law passed while he is a member, whether he votes for it or not.<sup>1</sup>

As to the limit and extent of the rules which such an organization can adopt, it appears to be established that its members possess the right to make such regulations for the government of the body as they may deem proper, providing that they contain nothing unreasonable<sup>2</sup> or against the law of the land, which, of course, includes anything immoral or against public policy; and that, with these necessary limitations, their rules will be obligatory upon each member assenting thereto.<sup>3</sup>

"It follows, from the very nature of such an organization," says the court, in *White vs. Brownell*, "with such objects, intents, and purposes, that there must be rules and regulations for the good order of the association; and such rules should be held to be conclusive as to the mode of transacting business between the members, and as to the privilege of admission to and continued enjoyment of membership."<sup>4</sup>

But, in passing upon questions involving the propriety and gal, and of no force where it has not been carried in accordance with the provisions of the existing constitution of the society (*Hochreiter's App.* 8 Week. Notes Cas. 461).

<sup>1</sup> *MacDowell vs. Ackley*, 8 Week. Notes Cas. 464.

<sup>2</sup> No member is bound by a by-law which is unreasonable and which he does not consent to. *Hibernia Fire Eng. Co. vs. The Commonw.* 8 Week. Notes Cas. (Pa.) 320; *id.* April 21, 1880, 521; *Dunham vs. Trustees of Rachael*, 5 Cow. 462; *People vs. Med. Soc. of Erie*, 24 Barb. 570.

<sup>3</sup> *White vs. Brownell*, 4 Ab. Pr. (n. s.), 162, 193; *Hyde vs. Woods*, 2 Sawy. 665, per Sawyer, J; affirmed, 94 U. S. Reps. 528; *Leech vs. Harris*, 2 Brews. (Pa.) 571; *Singerly vs. Johnson*, 3 Week. Notes Cas. (Pa.) 541; *Leech vs. Leech*, *id.* 542, note; *Evans vs.*

*Wister*, 1 Week. Notes Cas. 181; *Thompson vs. Adams*, 7 *id.* 281; *Ang. & Ames on Corp.* (10th ed.) § 332-335; *Moxey's Appeal*, 9 Week. Notes Cas. 441, aff'g 37 Leg. Int. 82; *Hibernia Fire Eng. Co. vs. The Commonw.* 8 Week. Notes Cas. 320; *id.* April 21, 1880, 521; *People vs. Board of Trade*, 80 Ill. 134; but see this case questioned by the Supreme Ct. of Wisconsin in *State ex rel. Cuppel vs. Milwaukee Chamber of Comm.* 47 Wis. 670. See also *Baxter vs. Board of Trade of Chicago*, 83 Ill. 146; *Sturges vs. Board of Trade*, 86 Ill. 441; *Commonw. vs. St. Patrick's Benev. Soc.* 2 Binn. (Pa.) 442; *The Butchers' Benevolent Assoc.* 35 Pa. St. (11 Casey) 151.

<sup>4</sup> Per Van Vorst, J., *White vs. Brownell*, 3 Ab. Pr. (n. s.) 318, 326.

legality of their rules, where there is the slightest property interest involved,<sup>1</sup> the courts will apply the same rule which is used in the case of corporate bodies.

In *Leech vs. Harris*,<sup>2</sup> the court said: "I have very little doubt, therefore, that the same rules of law and equity, so far as regards the control of them, and the adjudication of their reserved and inherent powers to regulate the conduct and to expel their members, apply to them as to corporations and joint-stock companies."

In the case of *The People ex rel. Page vs. The Board of Trade of Chicago*,<sup>3</sup> the charter conferred upon the defendants the right to admit or expel such persons as they might see fit, in manner to be prescribed by the rules, regulations, or by-laws thereof; but the court held that this language only conferred upon the defendants the power to admit or expel for some just or reasonable cause.

In a later case<sup>4</sup> the Supreme Court of Illinois held that, without any consideration of the reasonableness or legality of the by-laws, it would not compel the defendants, by mandamus, to restore a member, who had been duly expelled, to the exercise of his rights. The court said: "Has relator such an interest or legal right to membership in the board as will be regarded by a court of justice?" And it held that, although the Board of Trade was incorporated, it was, in effect, but a voluntary association—not maintained for the transaction of business or pecuniary gain, but simply to promulgate and enforce among its members correct and high moral principles in the transaction of business; and refused to interfere.

This case is solitary in its position, and the Supreme Court

<sup>1</sup> See, as to distinction between unincorporated associations possessing property, and those instituted for mere social enjoyment or benefit, *People vs. Med. Soc. of Erie*, 24 Barb. 577. <sup>2</sup> 2 Brews. (Pa.) 571-576. <sup>3</sup> 45 Ill. 112. <sup>4</sup> *The People ex rel. Rice vs. The Board of Trade of Chicago*, 80 Ill. 134.

of Wisconsin has refused to follow it.<sup>1</sup> The better rule would seem to be that the courts will in all cases interfere, by appropriate legal remedy, to prevent the expulsion or interference with a member's rights in an unincorporated association where the latter is acting under a by-law, rule, or regulation which is illegal, unreasonable, or contrary to public policy.<sup>2</sup>

In the case of *Dawkins vs. Antrobus*,<sup>3</sup> where the plaintiff sought to have the court review a resolution expelling him from a club, James, L. J., after referring to the observations of the Lords Commissioners in another case<sup>4</sup>—to the effect that shareholders, assembled at a meeting duly convened, were the judges of what was a reasonable cause for removing their directors; and that although the court might inquire whether the meeting were regularly held, and in cases of fraud, clearly proved, might interfere with the acts done, still there was no jurisdiction, where no case of direct fraud was proved, to determine whether the decision of the meeting had, or had not, been unduly influenced by unfounded statements made by persons taking an active part in the proceedings—said that he agreed with every word of these observations, which were equally applicable to the case of a club. . . . “*Unless it could be said that their decision was so grossly unfair and unreasonable, that it could not have been arrived at unless from some malicious motives, this court had no power to interfere.*”<sup>5</sup>

In *State ex rel. Cuppel vs. Milwaukee Chamber of Commerce*,<sup>6</sup> the visitatorial power of courts over corporations was examined. The relator had been suspended from membership of the defendant for refusing to pay a fine imposed by

<sup>1</sup> *The State ex rel. Cuppel vs. Chamber of Comm.* 3 Northw. R. (n. s.) 713; s. c. 47 Wis. 670; 21 Alb. L. J. 23.

<sup>2</sup> *White vs. Brownell*, 4 Ab. Pr. (n. s.) 162, 193.

<sup>3</sup> L. R. 17 Ch. Div. 615.

<sup>4</sup> *Inderwick vs. Snell*, 2 Mac. & G. 221.

<sup>5</sup> See also, in this connection, *Labouchere vs. Earl of Wharncliffe*, L. R., 13 Ch. Div. 346.

<sup>6</sup> 47 Wis. 670.

its directors for violation of one of its rules. The rule in question prohibited its members from "gathering in any public place in the vicinity of the Exchange room," and "forming a market" for the purpose of making any trade or contract for the future delivery of grain or provisions, before the time fixed for opening the Exchange room for general trading, or after the time fixed for closing the same, daily. The charter authorized the corporation to make reasonable rules for the regulation of its members. The rule in question was held to be reasonable, and not an unlawful restraint upon trade, nor void for uncertainty; and the relator having been fairly tried, upon due notice, and in accordance with the rules of the corporation, and there being abundant proof against him tending to show that he had committed the offence charged, it was decided that he could not be restored by mandamus.

The visitatorial or superintending power of the State over corporations created by the Legislature will always be exercised in proper cases, through the medium of the courts of the State, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises. To this end the courts will issue writs of quo warranto, mandamus, or injunction, as the exigencies of the particular case may require; will inquire into the grievance complained of, and, if the same is found to exist, will apply such remedy as the law prescribes. Every corporation of the State, whether public or private, civil or municipal, is subject to this superintending control, although, in its exercise, different rules may be applied to different classes of corporations. The Court said that, in the light of these views, "we cannot accept the doctrine which seems to have received the sanction of the Supreme Court of Illinois in *The People ex rel. Rice vs. The Board of Trade of Chicago*,<sup>1</sup> that the power of such

<sup>1</sup> 80 Ill. 134.

corporations to enact by-laws is unlimited, and that the courts will not interfere with the enforcement of any by-laws thus enacted. The case seems in conflict with earlier decisions of that court, and we are not aware that the court has reasserted any such doctrine, although it has since considered several cases involving the legality of the proceedings of the same Board of Trade.<sup>1</sup> True, these were equity cases, in which the respective complainants sought to restrain the board from expelling them, or to compel it to restore them after expulsion; yet the doctrine of *The People ex rel. Rice vs. The Board of Trade*, *supra*, is referred to hypothetically in the opinions of the court, and no mention whatever is made of that case. Whether that learned and able court adhere to that doctrine or not, we are unable, as at present advised, to adopt it as the law of this State." We have seen from this case what the "visitatorial" power of the State over corporations is, and in what cases the courts will exercise the same.

Although, as we have shown, a Stock Exchange is not a corporation, yet it practically exercises the functions of one; and there seems to be no good reason why the courts should not be guided by the same principles, in interpreting their by-laws, as they apply in the case of corporations, keeping in view,<sup>2</sup> of course, the different objects and ends for which the

<sup>1</sup> See *Fisher vs. The Board of Trade of Chicago*, 80 Ill. 85; *Sturges vs. Same*, 86 id. 441; *Baxter vs. Same*, 83 id. 146.

<sup>2</sup> This is the view expressed in *Leech vs. Harris* (2 Brews. (Pa.) 571), by Mr. Justice Pierce, who said: "I have very little doubt, therefore, that the rules of law and equity, so far as regards the control of them, and the adjudication of their reserved and inherent powers to regulate the conduct and to expel the members, apply to them as to corporations and joint-stock companies."

See also *Waterbury vs. Mer. Union Exp. Co.* 50 Barb. 160. In *White vs. Brownell*, however (4 Ab. Pr. (n. s.) 162), the court said: "*A member of a body of this description (a Stock Exchange) has, as such, undoubtedly rights which the law will protect; but they do not rest upon the same ground, and are by no means coextensive with the franchise enjoyed by a member of a corporation. They depend upon the nature of the organization, upon the object for which it was formed, and upon the rules, regulations, constitution, or by-laws*

incorporated and non-incorporated bodies may have been instituted. To confer upon an unincorporated association an unlimited power to make by-laws would be not only to raise it above corporations which are supposed to have special franchises, but to endow it with legislative authority.<sup>1</sup>

The utmost that these associations can claim, therefore, is the power to make rules and regulations for their internal government, which the courts will not pronounce oppressive or unreasonable; and, when their rules are brought into a court of justice, for construction, they must also submit to the test which is applied to the by-laws of incorporated bodies, and submit to have them declared as void, when they violate the Constitution or laws of the United States, or of the individual States where the associations exist, or the common-law as it is generally accepted.<sup>2</sup>

which are explanatory of its purpose, and which the body has adopted for its government." But the learned judge who delivered the opinion in that case expressly admitted that the rules of these voluntary associations must have "*nothing in them in conflict with the law of the land.*"

<sup>1</sup> As to the legality of unincorporated joint-stock associations at common-law, see Ang. & Ames on Corps. (10th ed.) § 591, note 4; Lindley on Part. (4th ed.) 5.

<sup>2</sup> Ang. & Ames on Corps. (10th ed.) § 332.

The following is an apt and amusing case illustrative of the rule that an association cannot pass any rule or by-law which is in violation of the principles of law. It was an indictment for assault and battery, the defendants justifying under a rule of a voluntary unincorporated society. The defendants and the prosecutrix were members of a benevolent society known as the "Good Samaritans," which society had certain

rules and ceremonies known as the ceremonies of initiation and expulsion. The prosecutrix having been remiss in some of her obligations, and, when called upon to explain, having become violent, the defendants, with others, proceeded to perform the ceremony of expulsion, which consisted in suspending her from the wall by means of a cord fastened around her waist.

This ceremony had been inflicted upon others, theretofore, in the presence of the prosecutrix. She resisted to the extent of her ability. The court, on appeal, held:

"When the prosecutrix refused to submit to the ceremony of expulsion established by this benevolent Society, it could not be lawfully inflicted. Rules of discipline for this and all voluntary associations must conform to the laws. If the act of tying this woman would have been a battery, had the parties concerned not been members of the "Society of Good Samaritans," it is not the less a battery because they were all members of

*(b.) Power of Suspension and Expulsion.*

One of the most important rules in an association or company is that which relates to the power of suspension and expulsion from membership. The cases which are to be found in the books upon this subject are quite numerous, but they have mainly arisen between incorporated bodies and their members. It is not deemed within the limits of this undertaking to collect that class of cases, but they will all be found in the treatises on corporations cited below.<sup>1</sup>

It seems to be reasonably well settled that, as unincorporated societies have the right to prescribe rules for the conduct of their business, they have the correlative power to enforce them; and that for a violation of such rules, after a hearing in accordance with the methods prescribed in the constitution or rules, any offending member may be either suspended or expelled from membership, as the nature of the act justifies.<sup>2</sup>

And an unincorporated body has not only the right to expel a member for a violation of its express rules, where such a penalty is attached to the act, but such association has the inherent power to expel its members, in the following cases, for certain acts, although they may not be specifically mentioned in its by-laws:

1. When an offence is committed, which has no immediate relation to a member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men. Such as the offences of perjury, forgery, etc. But before an

that humane institution. The punishment inflicted upon the person of the prosecutrix was wilful, violent, and against her consent, and thus contained all the elements of a wanton breach of the peace."

State vs. Williams, 75 N. C. 134.

<sup>1</sup> Ang. & Ames on Corps. (10th ed.) § 408 et seq.; Potter on Corps. § 721.

<sup>2</sup> Leech vs. Harris, 2 Brews. (Pa.) 571; White vs. Brownell, 4 Ab. Pr. (n. s.) 162, aff'g 3 id. 318.



expulsion is made for a cause of this kind, it is necessary that there should be a previous conviction by a jury according to the law of the land.

2. When the offence is against his duty as a corporator ; and, in that case, he may be expelled, on trial and conviction, by the corporation.

3. When the offence is of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land.<sup>1</sup>

Upon this question of disfranchisement there is a well-defined distinction between those bodies, corporated or unincorporated, where the members exercise a personal and active supervision or duty, and in those commercial organizations instituted mainly for gain, where the members do not actively participate in the management, but merely hold certificates of stock, which are transferable by assignment and delivery, and which entitle each holder to a proportionate share of the assets, profits, and earnings of the company. In the former class the personal character and conduct of the member may be of great importance, and the rules stated above, respecting the power of expulsion, will rigidly apply ; but in the latter class the personal character of the stockholder is of no particular concern ; and, consequently, it seems to be settled, both by reason and precedent, that, generally, a member cannot be disfranchised, and deprived of his rights in the corporate property, for acts of misconduct disconnected with the corporate business.<sup>2</sup>

The rule that seems to be applied to all cases is, that when a member disqualifies himself from assisting in promoting the object and purpose of the corporation, he forfeits his corporate franchise, and may thus justify a vote of expulsion ; but

<sup>1</sup> *Leech vs. Harris*, 2 Brews. (Pa.) 571. § 410 ; *White vs. Brownell*, 4 Ab. Pr.

<sup>2</sup> *Ang. & Ames on Corps.* (10th ed.) (n. s.) 162-169.

even then, it seems, in a commercial joint-stock company, the member would be entitled to the amount of his stock, and could recover it in an action against the corporation.<sup>1</sup>

With this statement of the general rule, reference will now specially be made to the few cases which have arisen between Stock Exchanges and their members relating to the power of expulsion; and, as the subject is an entirely new one, we deem it better to set them out fully, that the views of the court may be thoroughly appreciated.

In the case of *White vs. Brownell*,<sup>2</sup> a claim and matter of difference arose between the plaintiff, a member of the Open Board of Brokers, and C. M. & Co., also members, growing out of their rights and obligations under a contract for the purchase of certain railroad stock, agreed to be sold and delivered by plaintiff to said C. M. & Co. The contract was made at the board, and as members thereof. A dispute subsequently arose, and, after notice to plaintiff, C. M. & Co. purchased a certain amount of the stock under the rules, but plaintiff refused to recognize the transaction or pay for the stock; and, in consequence thereof, C. M. & Co. made a claim against him for a large sum of money, being the amount of the difference in their favor. C. M. & Co. subsequently presented their claim to the Arbitration Committee, which, under the constitution of the board, had cognizance of all claims and matters of difference between members of the board, and its decision was declared binding. Under the constitution, an appeal would lie from the Arbitration Committee to the Board of Appeals. It was also provided in the by-laws that, as a means of mutual protection, it should be the duty of any member to report to the board all cases of defalcation of contracts of other members, and all cases of refusal or inability to pay differences, whereupon the president should declare the member so re-

<sup>1</sup> Ang. & Ames, §§ 410, 411.

<sup>2</sup> 3 Ab. Pr. (n. s.) 318.

ported suspended. From such suspension the reported member might appeal, and demand a hearing before the Executive Committee. After the claim of C. M. & Co. had been presented to the Arbitration Committee, a day for hearing was appointed, and plaintiff duly summoned to appear and answer. The plaintiff declined to appear before the committee, whereupon the latter heard and determined the matter upon the statements of C. M. & Co., and rendered judgment to the Board of Appeals; and, after the time for appeal had elapsed, C. M. & Co. brought the matter to the notice of the Committee on Membership, which, after investigation, reported to the board that plaintiff was in default under his contract, whereupon the president, in accordance with his duty, declared the plaintiff suspended. The plaintiff thereupon appealed to the Executive Committee; but before that body had convened he brought an action praying that the president and board should be restrained and enjoined from interfering with him in the full exercise of his rights, etc., as a member of the board, alleging that the action of the respective committees was unjust, and insisting that his original contract with C. M. & Co. was still in force. The court refused to give the plaintiff any relief, and dissolved the preliminary injunction which had been granted, on the ground that, as all the proceedings had been conducted in accordance with the by-laws, which plaintiff had submitted to upon becoming a member, a court would not interfere where there was no claim that the terms of the constitution were hard and unconscionable. The court said: "The very existence of this body depends upon the faithful observance of its organic law by all its members. The court must regard the constitution and laws of this board as the contract by which all the members are bound. The court cannot make any other contract for the parties than they have solemnly made for themselves. It is not the prov-

ince of courts of law to make contracts for parties. It may explain, interpret, enforce, and in some instances, where contracts are hard and unconscionable, relieve from them. But there is no claim in this suit that the terms of this constitution adopted by the plaintiff are hard and unconscionable. The plaintiff does not ask to be relieved from his membership, he rather demands that he may be allowed to remain in the association, under the constitution; he does not wish to be suspended, or have his connection determined and ended. In an organization of the character of the Open Board of Brokers, with its several hundred members, the business transacted at its rooms being daily large in amount, and the stocks and securities dealt in being ever fluctuating in value, it was not unreasonable to apprehend that there would be constantly occurring differences between members acting as agents for others, in regard to the terms of contracts and as to the obligations and duties of contracting parties, under agreements often hastily made. The temptation to avoid a contract in a rapidly rising or falling market, as the pecuniary interest of a party might prompt, rendered it imperative that some tribunal in the body of the association should be appointed, and agreed upon, to take cognizance of, and exercise jurisdiction over, all claims and matters of difference which might arise between members of the board. This appears the more important, as confidence in each other and in the engagements which they might make one with the other, and in the fairness, openness, and uprightness of their transactions, and in the certainty that their engagements would be fulfilled, are announced as the causes which led to the organization. To be effective, their decisions should be prompt. As these engagements would be constantly maturing, it was eminently proper that a tribunal should be near to render speedy and exact justice. Confidence is the real life of such engagements; hence the appoint-

ment of a Committee of Arbitration is a prominent feature in the constitution of this board; and, by the express assent of each member, jurisdiction is awarded to this committee *in advance* of all claims and matters of difference which might arise between the members. . . . The plaintiff agreed, when he became a member, that the Arbitration Committee should take notice of all claims and differences between members, and that he would be bound by its decision. He refused either to acknowledge its conclusive force in a case in which he was interested, or to appeal from its decision. The constitution must be taken as a whole. The contracting part is an entirety. All its obligations are to be assumed and discharged; all its benefits are to be enjoyed. The enjoyment of the latter depends upon the performance of the former. Were it otherwise, the association would be of no real advantage to its members. It clearly appears that good faith in the observance of the constitutional obligations of the members was intended to furnish a test for the right of continued membership.

“There was some discussion on the argument of this motion as to the right of the plaintiff to revoke his consent to the jurisdiction of the Arbitration Committee over the claim and difference in question. In an action in a court of law to enforce the award, such question might be raised. For the purposes of this action, under the facts of the case, it can give him no relief. If the plaintiff would revoke the part of his agreement with his associates, which imposes duties and obligations upon him, he cannot insist, in a court of equity, that he shall be protected in the enjoyment of rights and privileges created by the same contracts. He that would have equity must do equity.”

This cause was subsequently appealed,<sup>1</sup> and the judgment of the lower court was affirmed. It will be observed that in

<sup>1</sup> 4 Ab. Pr. (n. s.) 162; s. c. 2 Daly, 318.

neither of the two elaborate opinions delivered in the cause did the court consider the legal aspect of the issue between the plaintiff and M. C. & Co., but the same was deliberately avoided, it being held that, under any circumstances, the plaintiff was first bound to exhaust his remedy—an appeal to the executive committee, in the manner pointed out in the constitution and by-laws of the board—before any resort to the courts could be had.

But *it seems* that where an unincorporated association, through a committee or otherwise, seeks to suspend or expel a member for acts not provided for in the constitution or by-laws, or by an *ex post facto* resolution, the courts will interfere by injunction to prevent the same.<sup>1</sup>

The case of Sewell vs. Ives, President, etc., New York Stock Exchange,<sup>2</sup> is an interesting case, illustrating this question of the right of suspension and expulsion. The plaintiff was a member of the firm of J. B. & Co., which failed. An investigation of the affairs of the firm showed that it had re-hypothecated securities upon which it had loaned money to Brokers; and the members of the firm, consisting of B. and the plaintiff, were arraigned before a sub-committee of the Governing Committee of the Stock Exchange, which reported in favor of their expulsion, on the ground that they had been guilty of obvious fraud under Article XX. of the Constitution of the Exchange, as follows: "Should any member be guilty of obvious fraud, of which the Governing Committee shall be the judge, he shall, upon conviction thereof, by a vote of two thirds of the members of the said committee present, be expelled, and his membership shall escheat to the Exchange; subject, however,

<sup>1</sup> Per Ingraham, J., Rorke vs. Russell, 2 Lans. (N.Y.) 244, 248. As to the power of an unincorporated association to suspend or expel a member, where there is no specific provision in the constitution or by-laws to that effect, see Leech vs. Harris, 2 Brews. 571.

<sup>2</sup> N. Y. Supreme Ct., Sp. T., reported in N. Y. *Daily Reg.* Feb. 11, 1879.

to the provisions of Article XIV. of the Constitution as regards the claims of members of the Exchange who are creditors of such persons."

The resolution of expulsion was approved of by the Governing Committee. There was a unanimous vote on B.'s guilt; but only a majority subscribed to the finding in plaintiff's case, though there was a two-thirds vote in favor of the latter's expulsion.

The plaintiff applied for an interlocutory injunction, restraining the president and other officers of the Exchange from interfering with his entering the Exchange and carrying on business there, alleging that his expulsion was unjust, and that it deprived him of his interest in the property of the Exchange and all of the rights and incidents pertaining to a membership therein. The Court held that, although the plaintiff's expulsion had been technically irregular, yet, as it was an admitted fact that the firm of which he was a member was insolvent, he could not justly complain of being suspended from membership; as under Article XIV. of the Constitution of the Stock Exchange all members becoming insolvent shall be suspended until they have settled with their creditors.<sup>1</sup>

<sup>1</sup> The full decision of Mr. Justice Sedgwick is given in this connection:

"It seems clear to me that Article XX. of the Constitution of the defendant means that before a member can be expelled he must be found guilty by a vote of two thirds of the members of the committee present, and that the attempted expulsion was void. This, of itself, does not give a cause of action. The illegal act must have some relation to a right which the law can protect. It must appear that an injunction to prevent the defendant acting upon the illegal expulsion

will permit the plaintiff to enjoy some substantial right, capable of present or future actual enjoyment. The complaint charges that the defendant, under the pretence of the void expulsion, deprived said plaintiff of the power to enter said building, or mart, to carry on such business as he may have to carry on, and has unlawfully deprived him of his seat, which cost him \$2000; has wrongfully and unlawfully deprived him of the interest in such property as the association may own; and has wrongfully and unlawfully deprived him of all the rights and privileges incident to such membership, which

This decision may be open to question, upon the ground that the effect of the difference between a "suspended" and an "expelled" member does not seem to have been fully regarded; inasmuch as a "suspended" member is one who under the rules of the Exchange can be restored to membership, whereas an "expelled" member forever loses his property and privileges. If the basis of proceeding against a member is under one particular rule, and the action of the Exchange held to be unauthorized and illegal, it seems rather anomalous to uphold the decision in ousting a member upon another

are very valuable to plaintiff, and absolutely essential to the discharge of plaintiff's business as Broker.

"The testimony showed that the defendant did exclude the plaintiff from the enjoyment of any and every privilege of a member, of a kind that would actually accrue to a member in his lifetime, and did claim that he was properly expelled. One of the defences was that before the expulsion, and, by reason of the plaintiff becoming insolvent, he became, by force of certain articles of the constitution, a suspended member, or suspended from membership, and had so ever remained. The effect of this suspension was that it legally deprived him of every present and future advantage of membership, and until he should settle with his creditors and should apply for readmission to membership. His readmission would then depend upon the vote of the committee or committees to which application must be made. The testimony was that he had not applied for readmission, and that he had not made a settlement with his creditors. There was no proof that he had the means of making one. Therefore, there is no present right recognized by the constitution to apply for readmission or to be readmitted. A mere lapse of time will not bring him to such a

right. An injunction against using the void expulsion would not enable him to enjoy or go into possession of any advantages. While present facts exist there is no possibility of any right accruing to him; and whether there will be a possibility hereafter is incapable of determination, if a mere possibility as distinguished from a contingent right is the subject of adjudication. If there be a doubt as to the correctness of this, it rests upon—first, that a suspended member had a right to go into what the witness called the "long room;" second, that after the attempted expulsion, and before a year had passed, there was a sale of the plaintiff's right of membership. The first refers to a right that of itself is not in the nature of property, has no pecuniary value, and an unlawful exclusion from it could be adequately compensated by damages. The second was not an injury to the plaintiff; as, from the nature of membership, he could be fully reinstated without setting the sale aside, and any claim of right to a resale would be repugnant to the foundation of this action.

"For the reason that the plaintiff has no substantial right that would be protected by injunction, the complaint must be dismissed."—*N. Y. Daily Reg.* Feb. 11, 1879.



rule merely justifying suspension, and to which no reference was made in the proceedings before the Exchange.<sup>1</sup> And this view seems to have finally prevailed in the case.

The case of *Powell vs. Abbott*<sup>2</sup> illustrates a case in which the courts will interfere. That was a bill in equity to restrain the defendants, members of the Philadelphia Mining and Stock Exchange, an unincorporated association, from carrying into effect the suspension of the plaintiff from membership in the association, and from disposing of certain stock belonging to him and deposited as security.

The bill set forth that the plaintiff had made a time contract with A., one of the defendants, for the sale of certain mining stock, and deposited with another member of the Exchange certain shares of other stock as security; that, the stock having advanced in price, A. demanded a further security, which plaintiff declined to make, on the ground that the sales at the advanced price were fictitious; that the question was then referred to the Arbitration Committee of the Exchange, whose duty it was to investigate and decide all claims and matters of difference arising between members of the Exchange, and also to adjudicate such claims as may be preferred against members by non-members, when non-members agree in writing to abide by its decision. The decision of the committee shall be final, except in cases involving a difference of one hundred dollars or over, when either party may appeal, within three days, to the Exchange for final adjudication. The committee decided that the plaintiff must make the additional deposit called for by A., from which decision plaintiff forthwith notified the acting chairman of the Exchange that he appealed; but before any further action

<sup>1</sup> And see this case again reported at p. 74 of this chapter, where in an action against the Stock Exchange for a conversion of his "seat" the plaintiff recovered damages on the ground that it had been illegally disposed of by the Stock Exchange.

<sup>2</sup> 9 Week. Notes Cas. 231, Nov. 1880.

could be taken on said appeal, at the request of said A. the acting chairman of said Exchange appointed a committee of three members, who called upon plaintiff, and inquired of him why he had not complied with the report of the Arbitration Committee. Plaintiff replied to them that he had appealed from its decision. The said committee thereupon reported back to the acting chairman of the Exchange that the following section of the by-laws be enforced :

“Section XI. Any member who fails to comply with his contracts, or who becomes insolvent, shall immediately inform the chairman of the Exchange of the fact, whose duty it shall be to give notice forthwith, from the chair, of the failure of such member ; and in case of the refusal or neglect of such delinquent to make such report to the chairman, it shall be the duty of any member, having a knowledge of the fact, to report the same forthwith to the Governing Committee or the chairman, who shall thereupon appoint a committee of three members to inquire into the facts, and report thereon, without delay ; and if said committee report the charge to be true, and the Exchange confirm the report, said member shall be suspended ; and it shall, furthermore, be the duty of the Governing Committee, upon receiving information thereof, or having, directly or indirectly, any knowledge of such failure on the part of any member to comply with his engagements, as above stated, to report the same, without delay, to the chairman, and ask for the appointment of a committee as before provided. And, in case of the insolvency of any member, he shall within three days make good, to the full amount thereof, all friendly loans of cash or stock from members, or any overdraft on any bank ; but seven days shall be allowed him in which to settle stock contracts.”

A meeting of the members who were present at the Exchange in the afternoon of the same day was called, without

any preliminary notice, to take action on the report of the committee. Plaintiff protested, at the time, that he had appealed from the decision of the Arbitration Committee, and asked that his appeal should be heard before any further action was taken in the matter. His objection and request were overruled, and his right of appeal denied him; and a motion was made to suspend him, which was thereupon put and carried.

The court, after commenting upon the nature of the association and its rules, and holding that where there was a conflict between the constitution of the association and by-laws the former must prevail, said :

“ But whether this be so or not, the right of the plaintiff to the protection of a court of chancery rests upon the denial to him of his right of appeal from the decision of the Arbitration Committee, and the consequent threatened sacrifice of his rights as a member of the association, and the selling and disposing of the stock deposited as security for his contracts before his rights have been adjudicated, in the manner prescribed by the constitution of the association.

“ It has been alleged by the learned counsel for the defendants that the plaintiff has a legal remedy by mandamus for restoration of his rights as a member if he has been improperly suspended, and that consequently he cannot invoke the equitable powers of this court.

“ A writ of mandamus would not secure to the plaintiff the protection which he seeks. The object of that writ would be to restore him to his rights as a member if he had been improperly suspended. In the meanwhile there might be the threatened sacrifice of his property, as complained of by him. And as this court has equitable jurisdiction for the supervision and control of these associations, and to prevent threatened mischief, upon the well-settled principle that where a court of

equity has jurisdiction for any purpose it will draw to itself jurisdiction of all questions incident to the subject-matter of inquiry, to make a final determination of the rights of the parties, and to prevent multiplicity of actions, I think the jurisdiction can be maintained." The special injunction was accordingly continued.

The case of *Leech vs. Harris* was another Stock Exchange case,<sup>1</sup> and it was there held that where a charter of a society provides for an offence, directs the mode of proceeding, and authorizes the society, on conviction of a member, to expel him, this expulsion, if the proceedings are not irregular, is conclusive, and cannot be inquired into collaterally by mandamus, action, or any other mode.

It is like an award made by a tribunal of the party's own choosing, for he became a member under and subject to the articles and conditions of the charter, and, of course, to the provisions on this subject as well as others. The society acts judicially, and its sentence is conclusive, like that of any other judicial tribunal. The courts entertain a jurisdiction to preserve these tribunals in the line of order, and to correct abuses; but they do not inquire into the merits of what has passed *in rem judicatam* in a regular course of proceedings.<sup>2</sup>

The recent case of *Moxey's Appeal*, decided by the Supreme Court of Pennsylvania, January, 1881,<sup>3</sup> is the latest direct adjudication upon this subject.

In that case, Moxey, in 1875, became a member of the Philadelphia Stock Exchange, and transacted business therein until July 29, 1876. At or about this time, the firm of B., M. & Co., of which the plaintiff was a member, purchased a

<sup>1</sup> 2 Brews. 571.

<sup>2</sup> The court cited the following authorities: *Commonw. vs. Pike Benev. Soc.* 8 W. & S. 247; *The White and Black Smiths' Soc. vs. Van Dyke*, 2 Whart. 309; *The Soc. for the Visit-*

*ation of the Sick vs. The Commonw.* 2 P. F. Smith (Pa.), 125.

<sup>3</sup> 9 Week. Notes of Cas. 440; affirming s. c. *sub nom.* *Moxey vs. Phila. Stock Exchange*, 37 Leg. Int. 82.

large number of shares of a certain company, from different members of the Board. Before the time for delivery, however, Moxey gave written notice to the president of the board of their insolvency, under Section XI. of the rules of the association which we fully quoted before (p. 50), except § 3, paragraph 1, which is as follows: "If any suspended member fails to settle with his creditors, and apply for readmission within one year from the time of his suspension, his membership shall be disposed of by the Committee on Admissions, and the proceeds paid *pro rata* to his creditors in the Exchange. The Governing Committee may, by a vote of two thirds of the members present, extend the time for settlement, and for application for readmission, of such suspended member."

The rules allowed a suspended member, presenting a certificate of discharge under the United States Bankrupt Laws, to become eligible, providing that upon a ballot, where not less than fifty votes are cast, and not more than fifteen black-balls appear against him, he may be reinstated; but such application shall be referred to a standing committee, whose duty it shall be to ascertain that the applicant has settled and arranged his affairs to the satisfaction of his creditors, and that his present situation affords a reasonable security in future transactions; and unless, and until, the said committee report in favor of readmitting the said suspended member, he shall be held to be still in default, and no vote to restore him to his seat shall be had. On January 15, 1877, plaintiff went into voluntary bankruptcy, and obtained his discharge on December 21, 1877. On January 15, 1878, he wrote to the Secretary of the Stock Exchange that he had obtained his discharge in bankruptcy, and he received an answer that, if he desired to apply for readmission under the rules of the Stock Exchange, the matter would be im-

mediately referred to the standing committee and be investigated.

The letter also notified him that, as more than a year had elapsed since his suspension, the Exchange considered itself entitled to sell his seat at any time. No notice was taken of this letter, and on July 5, 1878, plaintiff's seat was sold, on demand of his creditors, at public sale of the board, after posting and notice in accordance with the rules. At the time he joined the Stock Exchange a Gratuity Fund existed, payable on the death of a full member (whether suspended or not) to his nominee, widow, child, or legal representative.

On November 15, 1877, this was altered so that any suspended member who failed, for three months, to pay in full all gratuity dues and assessments should cease to be a full member for the purposes of the Gratuity Fund. Moxey was notified of the passage of this provision, but failed to pay his dues, and on March 7, 1878, was notified that he was debarred from participating in the benefit thereof.

He filed a bill in equity against the Stock Exchange, alleging that by far the greater part of the indebtedness of B., M. & Co. was merely fictitious, being founded upon contracts for the sale and delivery of certificates of stock which had no real existence; that they constituted gambling transactions, and that the payment of such debts would be in violation of the Bankrupt Act.

The court dismissed the bill, holding that, irrespective of the alleged gambling transactions, the evidence showed a large indebtedness, which plaintiff's firm was unable to meet; that by filing his petition in bankruptcy, the plaintiff had confessed his insolvency, and that he had not shown any offer to liquidate his indebtedness or arrange with his creditors under the rules of the Stock Exchange; and that the plaintiff had been suspended in accordance with the rules, on his

own confession and acts, and could not be restored except under the rules, which he had not complied with.

Upon appeal, the judgment of the lower court dismissing the bill was sustained; the appellate tribunal holding that, as the firm of which the plaintiff was a member had admitted their inability to fulfil their contracts, and, under the by-laws of the Stock Exchange, plaintiff was immediately suspended, no trial was necessary in such a case, the member having pleaded guilty. That the bankruptcy had the same effect. The court could see nothing unreasonable in the rule that before such a party could be readmitted he must settle with his creditors who are members of the Exchange. It may give them an advantage over other creditors, but they have a right to stipulate for it, and the appellant was a party assenting to the law. No suggestion appears to have been made that the assignee in bankruptcy, in whom all the assets of the plaintiff had become vested, was the proper party to recover any money or property to which plaintiff might be entitled; but the case was determined upon the grounds just stated.<sup>1</sup>

Finally, upon this question, it should be stated that, in all cases in which a member is proceeded against with a view to his expulsion, it is necessary that the proceedings should be conducted in accordance with the constitution and by-laws of the association, and that he should be duly notified to appear, and be allowed an opportunity to explain his acts or be heard in his defence.<sup>2</sup> In other words, there must be a charge made against him, of which he should be notified, and a time set for its hearing, not too limited to prevent the accused from properly collecting his proofs and producing his witnesses; and the hearing or trial of the charge should include the right to

<sup>1</sup> See also, in this connection, *MacDowell vs. Ackley*, Supreme Ct. Pa. 8 Week. Notes of Cas. 464.

<sup>2</sup> *Ang. & Ames on Corps.* (10th ed.) § 420; *People vs. San Francisco Benev. Soc.* 24 How. Pr. (N. Y.) 216.

examine his own witnesses, and cross-examine those against him, and to present such suggestions as he may deem proper. In fine, he should be allowed a full and fair opportunity of defending himself.

This question of notice was recently considered by the Court of Appeals of New York, in *Wachtel vs. Noah Widows and Orphans' Benevolent Society*;<sup>1</sup> and it was held that an association whose members become entitled to privileges or rights of property therein cannot exercise its powers of expulsion without notice to the party charged or without giving him an opportunity to be heard; and that where the charter of a beneficiary association provided that the secretary should give to a member who is six months in arrear a written notice of the fact, and that "he shall be stricken from the roll if he does not pay his dues within thirty days," a notice was essential to deprive the member in arrears, or his representative after his death, of the benefits of membership in the society; and that the fact that the member had changed his place of residence, without notifying the society, was not an excuse for a failure to serve a notice upon him, especially when there was a specific penalty imposed in the by-laws of the society upon a member changing his residence without giving notice.<sup>2</sup>

In the celebrated case of *Labouchere vs. Earl of Wharncliffe*,<sup>3</sup> several important questions relative to the expulsion of members of voluntary associations were considered. One of the rules of the club, of which plaintiff was a member, provided that "in case the conduct of any member, either in or out of the club, shall, in the opinion of the committee, after

<sup>1</sup> 84 N. Y. 28. For other cases relating to power of unincorporated associations to expel a member, see preceding subdivision, p. 34. *Foster vs. Harrison*, Week. Notes of Cas. 171.

32 N. Y. 187; *Commonw. vs. Penns. Benev. Soc.* 2 S. & Rawle, 141; *Innes vs. Wylie*, 1 C. & K. 257. Consult also *Olery vs. Brown*, 51 How. Pr. 92.

<sup>2</sup> See also *Bartlett vs. Med. Soc.*

<sup>3</sup> L. R. 13 Ch. Div. 346.



inquiry, be injurious to the welfare and interests of the club, the committee shall call upon him to resign."

The court held that the words "after inquiry" did not mean that the committee might take up a newspaper, see in it that Mr. A. B. has written an objectionable letter, or has been brought up at a police-court for drunkenness, and then expel him; but that the inquiry should be a fair one into the truth of the alleged facts. That where the conduct of a member is impugned, such conduct should be inquired into; and the committee making the inquiry ought to see what excuse or reason the accused member can give for it, and they ought to give him notice that his conduct is about to be investigated, and afford him an opportunity of stating his case to them. And the notice should not be ambiguous, but should clearly inform the member that his conduct was to be investigated. At a special meeting of the committee, held on the 16th of October, 1879, it was resolved that the plaintiff be called upon to resign in accordance with the above rule. This he refused to do. Rule 31 of the club provided that the committee should, at any time, have power to call a general meeting on giving a fortnight's notice. On the evening of the 31st of October, an adjourned meeting of the committee was held, which continued in session into the following morning; at which meeting it was resolved to call a general meeting of the club to consider the expulsion of the plaintiff. Notice was posted in the club-house at 3 A.M. of the same morning, the 1st of November, calling such a meeting to be held on the 14th of November; and, in the course of the 1st of November, notices were mailed to the members of the club. According to the statement of the secretary of the club, the notice posted in the club-house at 3 A.M. on the morning of the 1st of November would be reckoned, having regard to the custom of the club, as being done on the

31st of October, on which day the notice was dated. On the 14th of November the general meeting of the club was held. There were one hundred and seventeen members present, all of whom voted, except the plaintiff and one other; of whom seventy-seven voted for the committee, and thirty-eight for the plaintiff. The plaintiff was present, addressed the meeting, and protested against his expulsion; but made no objection to the proceedings on the score of irregularity or the insufficiency of the notice.

In respect to the sufficiency of the notice, the court held that, the notice having been first posted on the 1st of November, it was not a fortnight's notice, and that, therefore, the meeting was irregularly called. That a fortnight had a definite legal meaning, and was not affected by the secretary's notion of the club-day. It was further held that the plaintiff had not waived the irregularity by addressing the meeting; that the plaintiff had said that he protested against his expulsion, and that was sufficient. In respect to whether plaintiff had been expelled by a two-thirds vote of "those present," the court said: "The rule of the club was to the effect that, in the event of a member refusing to resign, a general meeting of members should be called, at which it should be competent for two thirds of 'those present' to expel him. Now, Mr. Labouchere has stated that there were one hundred and seventeen persons present, of whom one hundred and fifteen voted; that he himself was present, but did not vote; and that the number who voted for his expulsion was seventy-seven. It is clear, therefore, that if there were one hundred and seventeen persons present, seventy-seven were not two thirds of the number. The expulsion was, therefore, irregularly made.

"When a resolution is put to a meeting, the persons present may take one of these courses: they may vote for or

against it; or, not wishing to express a positive opinion on the question, refrain from voting at all. This being so, those who do not vote may, by not doing so, turn the scale in favor of the accused member of the club. It was, therefore, the duty of the secretary to ascertain, first, how many persons were present when the question was put, and, secondly, how many of those present had voted for the resolution; but no such course has been adopted in this instance. It appears to me, then, that this also is a fatal objection."

So, in *Fisher vs. Keane*,<sup>1</sup> in an action against the Trustees and Committee of the Army and Navy Club, asking for a declaration that a resolution purporting to expel the plaintiff from membership in the Army and Navy Club was null and void, Jessel, M. R., construed the rule under which the plaintiff was expelled, and held that the action of the committee was irregular, and, further, decided that a committee of a club, acting under its rules, is bound to act according to the ordinary principles of justice, and cannot convict a man of a grave offence, warranting his expulsion, without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him; he should be given an opportunity of either defending himself or palliating his conduct.

The question also came up in New Jersey, in the case of *Sibley vs. Carteret Club of Elizabeth*.<sup>2</sup> In that case the club was incorporated, and possessed power, in virtue of its charter, to make regulations and by-laws for the admission, suspension, and expulsion of members. Under one of the sections of the constitution it was provided that, if a member remained in default of his indebtedness after fifteen days of posting, he should forfeit his membership in the club, etc. The Board of

<sup>1</sup> 41 L. T. 335; s. c. L. R. 11 Ch. Div. 353; 49 L. J. Ch. 11.      <sup>2</sup> 40 N. J. L. Rep. 295.

Managers, upon failure of the relator to pay after posting, resolved that he ceased to be a member; whereupon the relator sued out a writ of mandamus, commanding them to cause his name to be replaced upon the roll of members. The writ was granted, the court holding that there could be no forfeiture by a mere failure to pay dues, unless there was a determination of that fact by the Board of Managers, upon notice to the member charged; that the right of membership in a club is one which the courts will protect; and that an irregular removal will warrant the use of the writ of mandamus to effect a restoration of the expelled member to his rights.<sup>1</sup>

And a contract made between a Broker and his Client, that if the former would refuse to appear before the Arbitration Committee and suffer suspension, the latter would reimburse him for all losses incident to giving up his business, is good, and damages may be recovered for its breach.<sup>2</sup>

A club cannot recover dues from a member during his suspension from the club, unless the by-laws to which the member has subscribed contain an express or implied contract to pay dues during suspension. And it seems that where the by-laws of a club provide that a member may be expelled for not paying his dues or indebtedness, the expulsion of the member is an election as to remedies, and, after expulsion takes place, action will only lie where he has received some consideration after his suspension or expulsion.<sup>3</sup>

But before a member of an unincorporated association can appeal to the courts, it must appear that he has exhausted all of the remedies provided for by the constitution and by-laws of the association.

This question arose in *White vs. Brownell*,<sup>4</sup> and the court

<sup>1</sup> 40 N. J. L. Rep. 295.

<sup>3</sup> *The Carteret Club vs. Florence*,

<sup>2</sup> *White vs. Baxter*, 71 N. Y. 254, 3 N. J. L. Jour. (1880) 208.

aff'g 9 J. & S. (N. Y. Superior Ct. Rep.) 358.

<sup>4</sup> 4 Ab. Pr. (n. s.) 162.

held that, before it would examine into any proceedings of the committee of the Stock Exchange, it must appear that the plaintiff had exhausted all of the remedies provided for in the constitution and by-laws, the court saying: "The by-law having provided a mode for reviewing and correcting any error or injustice on the part of the committee on membership, in reporting to the president that the plaintiff was in default he was bound to avail himself of the remedy provided by the constitution and by-laws of the body of which he had become a member, before he can ask a court of equity to investigate a proceeding not necessarily final in the body itself, but which was there subject to review, and might be annulled by the action of a committee expressly clothed with authority to investigate it (*Carlen vs. Drury*, 1 *Vesey & B.* 154)."<sup>1</sup>

But the courts will not review and set aside proceedings of a society, taken under the authority of its articles of association assented to by its members, for the expulsion of a member upon notice of charges presented, and a hearing according to the by-laws, either because the charges were insufficient or the proceedings irregular, *unless* injustice has been done, which the party charged, tried, and expelled could not have objected to in the society or committee meeting.

Proceedings to expel a member under charges presented, notice given, and a hearing afforded, in conformity with articles of association agreed to by all the members, are to be considered without too much regard to any technicalities. Substantial justice is to be followed rather than form.<sup>2</sup>

So, where a committee of a club have power to expel any member whose conduct is, in their opinion, injurious to the in-

<sup>1</sup> *Id.* 199; *Lafond vs. Deems*, 81 N. Y. 507; see also *Soc. for Visitation of Sick vs. Commonw. ex rel. Meyer*, 52 Pa. St. 125. In *Olery vs. Brown*, 51 How. Pr. (N. Y.) 92, it appeared that plaintiff had exhausted his remedies in the association, and his appeal to the courts was upheld.

<sup>2</sup> *People vs. The St. George's Soc. of Detroit*, 28 Mich. 261.

terests of the club, and they exercise this power, all that is required is that the committee should form their opinion in a *bona fide* way, and the question whether their opinion is just or unjust is immaterial. The court will not interfere with the authority of the committee unless it appear that their decision has been arrived at dishonestly, or through caprice or improper motives.<sup>1</sup>

In respect to the form of the remedy which a member of one of these associations should adopt to prevent an interference with his membership or with his rights in the body, the question seems to have been generally raised by injunction. In the case of *Leech vs. Harris*,<sup>2</sup> where the plaintiff had prayed for an injunction to restrain the Board of Brokers from acting on a report of a committee by which he would be expelled, the defendants contended that the plaintiff's action was premature, and "that the board must first decide whether the case was within its jurisdiction before a court can interfere." The court, upon this point, said: "But whether this be so or not, equity prevents mischief. It does not wait until it is consummated. It does not even measure the paces by which it advances. It meets it at the threshold, and seeks to prevent a meditated wrong more often than to redress an injury already done. Courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which special injunctions shall be granted or withheld (2 Story's Eq. Juris., § 862, 959 b)."<sup>3</sup>

<sup>1</sup> *Gardner vs. Fremantle*, 19 W. R. 256; *Hopkinson vs. Marquis of Exeter*, 5 Eq. L. R. 63-66; *Lyttleton vs. Blackburn*, 33 L. T. Reps. 641. But see *Evans vs. Phila. Club*, 14 Wright (Pa.), 107.

<sup>2</sup> 2 Brews. (Pa.) 571.

<sup>3</sup> To same effect, *Powell vs. Abbott*, 9 Week. Notes of Cas. 231. But see, in this connection, *Rorke vs. Russell*,

2 Lans. (N. Y.) 244. See also, as to general power of court to interfere by injunction in cases of unincorporated associations like clubs, *Joyce on Injunctions*, 748, 751; *Heath vs. Prest. of the Gold Exchange*; 7 Ab. Pr. (n. s.) 251. In the following cases the injunction was denied on the merits, but not on the ground that the remedy invoked was im-

But when a member has been expelled from a corporation for no legal cause, mandamus lies against the corporation to compel it to restore him to membership.<sup>1</sup>

Mr. High says: "The use of the writ of mandamus as a remedy for the wrongful amotion of a corporator, and to restore him to the enjoyment of the franchise, of which he has been wrongfully deprived, is of very ancient origin, and may be distinctly traced to a period as early as the reign of Edward the Second. It was also used for the same purpose in the time of Henry the Sixth; and in the reign of Elizabeth it was treated as a well-established jurisdiction."

The following are some of the grounds held sufficient for invoking the extraordinary aid of mandamus: Want of notice of proceedings taken for the removal of a member, and want of opportunity of being heard in his defence;<sup>2</sup> where no sufficient cause has been shown for the removal, and where the proceedings have been conducted with irregularity, and in a spirit of malice;<sup>3</sup> and where the member has been illegally removed for violating a rule of the corporation which is in conflict with public policy and the law of the land;<sup>4</sup> or where he has been expelled under an unreasonable by-law.<sup>5</sup> Where, however, a corporator has been regularly tried in ac-

proper: *Sonneboru vs. Lavarello*, 2 Hun, 201; *Rorke vs. Russell*, 2 Lans. Med. Soc. of Erie, 24 Barb. (N. Y.) 570; *State vs. Chamber of Comm.* 20 Wis. 63; *Delacy vs. Neuse River Nav. Co.* 1 Hawk. (N. C.) 274; *Franklin Beneficial Assoc. vs. The Commonw.* 10 Pa. St. 357.

<sup>1</sup> High, Extra Legal Rem. § 291; *State vs. The Georgia Med. Soc.* 38 Ga. 608, where there is a review of authorities; *Evans vs. Phila. Club*, 50 Pa. St. 107; *The Carteret Club vs. Florence*, 3 N. J. L. J. 208; *Commonw. vs. The German Soc.* 15 Pa. St. 251; *People vs. Mechanics' Aid Soc.* 22 Mich. 86; *People vs. Med. Soc. of Erie*, 24 Barb. (N. Y.) 570; *State vs. Chamber of Comm.* 20 Wis. 63; *Delacy vs. Neuse River Nav. Co.* 1 Hawk. (N. C.) 274; *Franklin Beneficial Assoc. vs. The Commonw.* 10 Pa. St. 357.

<sup>2</sup> Extra Legal Rem. § 291.

<sup>3</sup> *Delacy vs. Neuse River Nav. Co.* (supra).

<sup>4</sup> *State vs. The Georgia Med. Soc.* (supra).

<sup>5</sup> *People vs. Med. Soc. of Erie* (supra).

<sup>6</sup> *Commonw. vs. St. Pat. Benev. Soc.* 2 Binn. (Pa.) 442.

cordance with the rules of the association, which he has assented to by becoming a corporator, and has been expelled in due form, the merits of the expulsion will not be examined in proceedings for a mandamus.<sup>1</sup>

So it would seem that a mere restriction upon the mode in which the member may exercise his corporate right, and not an actual exclusion from the corporation, affords no ground for a mandamus.<sup>2</sup> And mere informality in the proceedings for the removal of a member, especially where they are carried by his own action, will not justify interference by mandamus, where there was just ground for his removal, and the member has been acting in hostility to the corporation, and threatens to continue his opposition.<sup>3</sup>

The return must set forth distinctly all the facts essential to the conviction, both as to the cause of disfranchisement and the mode of proceeding.<sup>4</sup>

*(c.) Rule Giving Members of Exchange Lien on Proceeds of Defaulting Members' "Seats," etc., in Preference to other Creditors, not Illegal.*

In the case of *Hyde vs. Woods*,<sup>5</sup> it was held that a provision in the constitution of a Stock and Exchange Board (a voluntary unincorporated society, whose members are elected by ballot and are limited in number)—that a member, upon failing to perform his contracts or becoming insolvent, may assign his seat to be sold, and that the proceeds shall, to the exclusion

<sup>1</sup> High, Extra Legal Rem. § 292; *Crocker vs. Old South Soc.* 106 Mass. Society vs. The Commonw. 52 Pa. 489.

St. 125; see also *Black and White Smiths' Soc. vs. Vandyke*, 2 Whart. 309; also, *Commonw. vs. Pike Benev. Soc.* 8 W. & S. 247. Mandamus to restore corporator, *Franklin Beneficial Assoc. vs. The Commonw.* (supra).

<sup>3</sup> High, Extra Legal Rem. § 301; *State vs. Lusitanian Portuguese Soc.* 15 La. An. 73; *King vs. Griffiths*, 5 Barn. & Ald. 731.

<sup>4</sup> *Society vs. Commonw.* 52 Pa. St. 125, and cases there cited.

<sup>5</sup> 94 U. S. (4 Otto) 523, affirming 2 High, Extra Legal Rem. § 300; *Sawyer*. 655.



of his outside creditors, be first applied to the benefit of the members to whom he is indebted—is neither contrary to public policy nor in violation of the Bankrupt Act. The reasoning of the court was that the San Francisco Stock and Exchange Board was a voluntary association, and the members had a right to associate themselves upon such terms as they saw fit to prescribe, so long as there was nothing immoral, or contrary to public policy, or in contravention of the law of the land in the terms and conditions adopted. No man was under any obligation to become a member unless he saw fit to do so; and when he did, and subscribed to the constitution and by-laws, thereby accepting and assenting to the conditions prescribed, he acquired just such rights, with such limitations, and no others, as the articles of the association provided for. The decision was affirmed by the Supreme Court of the United States,<sup>1</sup> where the court, through Mr. Justice Miller, said: “There is no reason why the Stock Board should not make membership subject to the rule in question, unless it be that it is a violation of some statute or of some principle of public policy. It does not violate the provision of the Bankrupt Law against preference of creditors, for such a preference is only void when made within four months previous to the commencement of the bankrupt proceedings. Neither the Bankrupt Law nor any principle of morals is violated by this provision, so far as we can see. A seat in this board is not a matter of absolute purchase. Though we have said it is property, it is encumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of Article XV., neither when Fenn bought nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it, into whose hands

<sup>1</sup> 94 U. S. 523.

soever it may come. As the creators of this right—this property—took nothing from any man's creditors when they created it, no wrong was done to any creditor by the imposition of this condition."

The case of *Nicholson, Assignee, vs. Gouch*,<sup>1</sup> was, in many respects, very much like the above, the action having been brought to recover certain property that, under the rules of the London Exchange of which the bankrupt was a member, had been received and paid to his fellow-members. This was asserted to be a preference, void by the Bankrupt Law; and the rules of the Exchange under which it was done were assailed on the same ground taken above. It is true that in the decision of the Queen's Bench in banc., Lord Campbell, the Chief-Justice, ruled against the plaintiff, on the ground that the money in question arose out of wagering contracts, which, as they could not have been enforced by the bankrupt, were therefore not subject to the claim of the assignee; but Compton, J., held, also, that the money being received and distributed under the rules of the Stock Exchange, by reason of the bankrupt having become a member subject to said rules, this was a sufficient defence to the party who so received and distributed it.

So, in the State of Pennsylvania, there are several decisions which uphold the right and power of the Board of Brokers to make by-laws by which members of the association are entitled to a preference in the payment of their debts from the proceeds of the sale of an insolvent member's seat over outside creditors.

In the case of *Leech vs. Leech*,<sup>2</sup> an outside creditor sought to reach the proceeds of the sale of his debtor's seat in the Exchange by attachment; but the court held that the claims of the fellow-members of the insolvent should first be paid;

<sup>1</sup> 5 El. & Bl. 999.

<sup>2</sup> 3 Week. Notes of Cas. 542, note.

that this was the condition upon which the insolvent became possessed of his seat, and it could not be repudiated.<sup>1</sup>

In the case of *Singerly vs. Johnson*,<sup>2</sup> the plaintiff's intestate, at the time of his death, was a member of the Philadelphia Board of Brokers. After his death, his seat was sold by the secretary, under the provisions of the constitution, as follows: "Sec. XII. . . . When a member dies, his seat may be sold by the secretary, and after satisfying the claims of the members of the board, the balance shall be paid to his legal representatives."

The plaintiff's intestate was indebted to another member of the board at the time of his death, which claim was passed upon and allowed by the Arbitration Committee, in pursuance of the constitution. On this state of facts, it was held—(1) that the decision of the Arbitration Committee was final and conclusive as to the existence, validity, and amount of the member's claim, and that a court of law has no jurisdiction to go behind or inquire into the finding of said committee; (2) that the agreement to abide by the arbitration clause, etc., in the constitution, entered into by Singerly, or implied by his membership, was not revoked by his death; (3) that the plaintiff, as the legal representative of the decedent, was only entitled to recover the balance, if any, after the payment of the member's claim, with interest; and that such limitation of his right was not affected by the fact that the decision of the Arbitration Committee was made after the commencement of the suit.

This case was followed by *Thompson vs. Adams*,<sup>3</sup> where the court held, that under the constitution and by-laws of the Philadelphia Stock Exchange, providing that a member may

<sup>1</sup> This decision was confirmed in the case of *Evans vs. Wister*, 1 Week. Notes of Cas. 181.

<sup>2</sup> 3 Week. Notes of Cas. 541.

<sup>3</sup> 7 Week. Notes of Cas. 230.

sell his seat if he has no claims against him, and also providing that, in case of death, a member's seat might be sold and the proceeds paid to his representatives, after satisfying claims of members, a secret equitable owner of a seat—one who had advanced the money to the member to enable him to purchase the same—has no right, as against members of the board who are creditors of the legal owner, to share in the proceeds of the sale of the seat on the death of the latter. It was held that the constitution and by-laws have the force of law as to its members. The court said :

“The jurisdiction of the courts cannot be ousted by contract, but any person may covenant or agree that no right of action shall accrue until a third person has decided on any difference that may arise between himself and the other party to the covenant. The leading case upon this subject, and followed in Pennsylvania, is *Scott vs. Avery*.”<sup>1</sup> Upon appeal the court said : “There is nothing unlawful or unreasonable in this regulation.”<sup>2</sup>

But by a recent decision in England the law upon this question seems to be differently settled by the House of Lords, where a member of the Exchange seeks to prefer his fellow-members to his outside creditors by *paying money* to the official assignee of the Exchange. In the case in question,<sup>3</sup> it appeared that C. was a member of the Stock Exchange, and became unable to meet his Stock Exchange engagements, of which fact he gave notice to the secretary. In such a case the rules of the Stock Exchange prescribe the course to be followed. The defaulter ceases to be a member of the body ; two members of the Exchange act as official assignees of the defaulter ; a meeting of the creditors is called ; the defaulter

<sup>1</sup> 5 House of Lords Cas. 811.

<sup>2</sup> See, also *Moxey's App.* ante, p. 52, where the court again held that

such a regulation was not contrary to law.

<sup>3</sup> *Tomkins vs. Saffery*, 3 L. R. App. Cas. 213.

(as he is required to do) makes his statement; and, the assembled creditors having decided what is to be done, the official assignees carry the decision into execution. The committee of the Exchange has the power to readmit the defaulter or to refuse him readmission. C. made his statement at the first meeting, declaring at that time he had no debts outside the Stock Exchange. His Stock Exchange creditors then consented to accept a composition, and to provide for a part of it he, at the demand of the official assignees, gave them a cheque for £5000, then standing to his credit in the Bank of England. The official assignees obtained the money and apportioned it among his Stock Exchange creditors. C. afterwards confessed to owing debts to a large amount to outside creditors, and was declared a bankrupt. The trustee in bankruptcy, on behalf of the general creditors, claimed from the official assignees of the Stock Exchange the £5000, and the court decided that the trustee was entitled to claim it, for the action of C. in paying it to the official assignees amounted to a *cessio bonorum*, and constituted an act of bankruptcy; and that the rules of the Stock Exchange as to defaulting members of the body are the rules of a domestic forum, which have no influence on the rights of those who are not amenable as members to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member.

The Lord Chancellor, in delivering his opinion in this case, said: "I can see nothing whatever in those rules which is deserving of any animadversion whatever. They seem to me to be judicious and business-like rules. They do not seem to me to be rules contemplating or intending in any way to warp or strain, or in any way to elude or defeat, the operation of the bankruptcy law of the country; but they are rules which, from the very nature of the case, are and must be sub-

ject to one infirmity—namely, that, if they are to be effectual, they must be applicable to the case of a person who not merely is a defaulter upon the Stock Exchange, but who has no creditors outside the Stock Exchange; because if such a person has creditors outside the Stock Exchange, the general law of the country will step in, and must step in, and will give to those creditors rights which these rules cannot take away from them, and which, I am bound to say, these rules do not profess to attempt to take away from them. Therefore, although everything done in the domestic forum of the Stock Exchange under those rules may be done according to the rules, and may be most wholesome in its operation for the members of the Stock Exchange, still what is done must be subject to the rights of those who are not amenable to the jurisdiction of the Stock Exchange; and when those higher rights come into conflict with these rules, of course these rules must give way to those higher rights.”

But in the case of *Ex parte Grant, Re Plumbly*,<sup>1</sup> the case of *Tomkins vs. Saffery* was distinguished; and the result shows that the English courts did not mean to condemn all the transactions of an insolvent Broker as void, whereby his fellow-members reaped the benefit of his assets to the exclusion of his outside creditors.

The facts of this case showed that on the 25th of June, 1879, Plumbly, a Stock-jobber, and a member of the London Stock Exchange, having given notice that he was unable to meet his engagements, was declared a defaulter in accordance with Rule 142 of the Stock Exchange. The same day he filed a liquidation petition, and a trustee was afterwards appointed. Grant, the official assignee of the Stock Exchange, in obedience to Rule 168, closed all Plumbly's contracts with members of the Stock Exchange, which were open for the next

<sup>1</sup> 42 L. T. R. (n. s.) 387.

account or settling day, the 27th of June; at the market prices on the 25th of the various stocks and shares contracted for; and called upon those members who on that footing were debtors on their contracts with Plumbly, to pay to the official assignee the differences due from them. On hearing this, the trustee gave notice to the debtors to pay the money to him, instead of to the official assignee. They, however, paid them to the official assignee. The amount of these differences so received was £3957, which sum was, under Rule 168, divisible among those members of the Stock Exchange who, on the above-mentioned footing, were creditors for differences on their contracts with Plumbly.

The rules of the Stock Exchange apply to Jobbers as well as to Brokers. It appeared to be the practice of Stock-jobbers to make two contracts equal and opposite at once, so that a Stock-jobber's legitimate profit is the difference between the buying and selling prices, and the fact of stocks going up or down in price does not affect him. The Jobber does not deal with an outside principal, but only with members of the Stock Exchange.

The trustee in the liquidation claimed the £3957 as part of the assets distributable among Plumbly's creditors. The registrar, being of opinion that the case was within *Tomkins vs. Saffery*,<sup>1</sup> held that the trustee was entitled to the money. The official assignee appealed, and the judgment was reversed upon the theory laid down by the court, per Baggalay, L. J., that the distinction to be drawn between this case and that of *Tomkins vs. Saffery* was a very marked one. Here there is no division of Plumbly's money. The official assignee holds no private assets of Plumbly, and the fund which he has collected is a fund collected by virtue of certain rules of the Stock Exchange; certain sums ascertained

<sup>1</sup> 37 L. T. R. (n. s.) 758; 3 L. R. App. Cas. 213.

in a particular way being raised from particular members of the Stock Exchange, and applied in a particular manner. These funds can in no respect be regarded as funds belonging to Plumbly; they are voluntary contributions of the members of the Stock Exchange, to be applied in satisfaction of the Stock Exchange creditors; or, if they are to be regarded as moneys handed over by persons who had become surety to meet the claims of the Stock Exchange, in either view of the case they cannot be claimed by the trustee. "It certainly did," says the learned justice, "at one time occur to me that some injustice might be done to the general creditors of Plumbly by the official assignee taking these sums. But the true view of the case appears to me to be this: As far as regards any losing contracts, entered into by Plumbly, the trustee in bankruptcy or in liquidation is relieved from them; and if, on the other hand, it is said that there may be some winning contracts, the answer, as far as regards them, is, that it would be impossible to realize on them, because, when the time arrived for the completion of the contract, Plumbly could not, and would not, have been ready and willing to perform them. In making these observations, I do not mean to imply that in such cases the contracts, whether losing or winning, are absolutely void; but, in regard to the case now under consideration, I am satisfied that no injury could be done to the outside creditors by the course pursued."

Upon a first reading, there seems to be very little substantial distinction between the case of *Tomkins vs. Saffery* and the last one. In both cases the money had been placed in the hands of the official assignee of the Stock Exchange, who had received the same from debtors of the insolvent member, and who had, with knowledge of the latter's insolvency or failure, paid out the money so received to his Stock Exchange creditors. But, in the one case, the official assignee received the



money by virtue of a check given by the defaulting Broker upon the Bank of England, an outside debtor; on the other hand, the official assignee received the money from voluntary payments made to him by members of the Stock Exchange who were debtors to the defaulter, but who were under no obligations to pay at the time they did, except by reason of their being such members.

There is nothing unreasonable in annexing to a membership of an Exchange a condition, that, if the member fails to perform his contracts, his seat and the money due him from fellow-members should first go to satisfy the claims of his fellow-members. Such a condition is in the nature of a lien on his property in the Exchange. It is not made secretly, nor with any intent to defraud creditors; nor are the latter injured any more in their rights than they would be in the case of a mortgage. It is upon the faith of this condition that his fellow-members transact any business with him, and it is hard to subscribe to a doctrine which invests subsequent outside creditors with the property of a defaulting member, which he has acquired by reason of his membership in the Exchange.

It must also be borne in mind, in this connection, that there is a wide difference in the facts of the American, from those in the English, cases upon which we are commenting. In the former cases the creditors sought to reach the seats, or the proceeds of the seats, of members of the Stock Exchange; seats which had been granted to the members with certain conditions attached, which gave a preference to their fellow-members; whereas in the English case of *Tomkins vs. Saffery* the Stock Exchange creditors sought to appropriate money in bank, belonging to the insolvent member, in preference to his outside creditors.

But the members of the Exchange have no lien upon the

proceeds of a seat illegally ordered to be sold by the association; and in an action by a member whose seat has been so illegally disposed of, against the President of the association to recover damages as for a conversion of his property, the fact that the proceeds have been applied towards satisfying claims against the member whose seat has been sold is not a matter in mitigation of damages, or the proper subject of a counter-claim. These propositions were laid down in the case of *Sewell vs. Ives, President*.<sup>1</sup>

In that case, the New York Stock Exchange, in January, 1878, attempted to expel the plaintiff upon an accusation of "obvious fraud," and in an action between the same parties the court adjudged and decided that his expulsion was illegal and void. The defendant, treating the plaintiff as effectually expelled, under Article XX. of its constitution, in April, 1878, sold his seat, and appropriated the proceeds to the payment of his creditors in the Exchange.

The court held that the seat of a member in the Exchange was property in every proper sense of the term, and could be sold; and was transferable as any other species of property having actual value as such. The price realized by the defendant was \$4000, which is proof of its then value. It was proved, and the court on the former trial found, that the plaintiff paid, on his admission to the board, \$2000 for his seat.

Although the plaintiff was a suspended member of the New York Exchange, it having been held and decided that his alleged expulsion therefrom was void and of no effect, it followed that, the sale of his seat by the board having been made solely upon the ground of his wrongful expulsion, the Exchange became by that act responsible to the plaintiff for any injury or damage done thereby.

It was claimed that the proceeds of this sale were applied

<sup>1</sup> N. Y. Superior Ct., N. Y. *Daily Reg.* May 18, 1881.

to the payment of the plaintiff's debts in the Exchange, and that such payment should be received in mitigation of damages, if not in bar to the action. The court said: "If this be so, it must be upon the assumption that the defendant had authority to dispose of the seat, and to receive and appropriate the proceeds of the sale to his creditors." The court held that, under the facts in the case, no such authority was shown, nor can any be inferred, as all the proceedings on defendant's part were wholly illegal and void.

The property wrongfully taken or appropriated by the defendant, in satisfaction of a demand against the plaintiff as owner, cannot be set up in bar or in mitigation of damages suffered by him. The first objection urged against the plaintiff's right to recover was that the action was for the conversion of personal property, commonly known as an action of trover. The declaration tersely set out "that the plaintiff was owner, and entitled to the possession, of a seat in the association of the value of \$10,000; that the defendant wrongfully and unlawfully sold said seat and converted the proceeds to its own use, to the plaintiff's damages."

The court held that it was too late to raise this objection. The defendants treated the seat of the plaintiff as their property, or they could not have undertaken to sell it. They are estopped by their own acts. The amount of recovery in the action, the court decided, was the amount of the proceeds received by the defendant, with interest.

*(d.) The Stock Exchange cannot Take Cognizance of Matters Arising outside of, and Disconnected with, the Purposes of its Organization.*

It would seem entirely reasonable to confine and limit the jurisdiction of the Stock Exchange to those matters which arise between its members in the course of their business with each

*other as Brokers*; otherwise its judicial powers might be extended to embrace every affair of human life, which was never contemplated, and which the law would not permit.

Thus, the wife of a Broker might bring her grievances before the Board or its Committees, and claim to have them settled by that tribunal, just as any outside person might insist upon having an action of assault and battery alleged to have been committed upon him by a member of the Exchange determined by the same forum. For very obvious reasons, the law will not permit any organizations to usurp the prerogatives of the regularly constituted courts of justice. One of the most important is, that such an organization has no power to issue subpœnas, or any other compulsory process, to enforce the attendance of witnesses. It can coerce its own members into attendance by threatening expulsion, but it has no power over outside witnesses.

Another equally important reason is, that the law has prescribed, for the determination of disputes between citizens, regular and well-adapted forms and proceedings, which no one can be deprived of against his will.<sup>1</sup>

Chief-justice Tilghman,<sup>2</sup> in speaking of a corporation taking cognizance of matters unconnected with the affairs of the society, said: So far from its being necessary for the good government of the corporation, it appears to me that taking cognizance of such offences will have the pernicious effect of

<sup>1</sup> See, for other cases illustrating this proposition, the next succeeding subdivision (e.).

It is very doubtful, under the cases next cited in the text, whether the 19th Article of the Constitution of the New York Stock Exchange is not illegal when it is sought to be used to investigate transactions of a member disconnected with his business in the Exchange. It is as follows:

"All debts, without distinction, are binding upon the members of the Exchange, and the Governing Committee will take cognizance of them upon complaints properly made and presented."

See also § VII. of Article IV. of the Constitution in this connection.

<sup>2</sup> *Commonw. vs. St. Pat. Beney. Soc.* 2 Binn. 449.

introducing private feuds into the bosom of the society, and interrupting the transaction of business.<sup>1</sup>

In the case of *Leech vs. Harris*,<sup>2</sup> the plaintiff was a member of the Philadelphia Board of Brokers, a private unincorporated association, similar to the New York Stock Exchange. One M. presented a complaint to the board, charging the plaintiff with having obtained money from him by falsely pretending that he had paid a large sum of money for certain oil lands, and thus inducing M. to purchase an interest in the same. Thereupon the board appointed a committee to investigate the charges, which it was proceeding to do, when the plaintiff procured an injunction, on the ground that the board had no jurisdiction over the question, and that it would be impossible for him to produce his witnesses without the aid of the process of the courts, which could not be obtained in behalf of defendant's tribunal. The court, after full argument, in a careful opinion granted a perpetual injunction, on the ground that the matter sought to be inquired into was not within the jurisdiction of the board. The court said:

"What the plaintiff really submitted to when he became a member of the Board of Brokers was that the board should take jurisdiction if he should refuse to comply with his stock contracts; not that they should have jurisdiction of his contracts touching houses, lands, leasehold estates, or farming interests. . . . I do not perceive that either by the law of the association, by the law of the land, or by submission to its jurisdiction, the Board of Brokers has acquired any right to arbitrate and settle the matters in dispute between the plaintiff and Mr. Reuben Manley, Jr. The courts of law are open to Mr. Manley to vindicate his rights and to redress any wrongs done to him. But the Board of Brokers cannot erect itself

<sup>1</sup> See also *Green vs. African Methodist Society*, 1 S. and Rawle (Pa.), 254.

<sup>2</sup> 2 Brews. (Pa.) 571.

into a tribunal for this purpose. The plaintiff has, in my opinion, a clear right to the protection of a court of equity. He has a valuable interest in his membership in the board, which cost him \$2000. He has an interest, in common with his fellow-members, in the accumulated funds of the association, and in the claim which he would have, in case of necessity, upon the fund set apart to aid poor or distressed members or their families whom the board may think proper to assist. He has a right, also, to be protected in his good name and reputation from unauthorized proceedings against him, in which he cannot have the assistance of a court of law to compel the attendance of witnesses or to obtain testimony from abroad.”<sup>1</sup>

*(e.) Members not Bound by Rules which Prevent Recourse to Courts of Law.*

This subject is closely connected with that which has been briefly discussed under the preceding subdivision.

It is a well-recognized principle of law appertaining to incorporated bodies that where their by-laws prohibit the members from pursuing their legal remedies beyond the jurisdiction of the corporation, such by-laws are void.<sup>2</sup> The theory being that no power less than that of the Legislature can exclude the subject or citizen from his right to legal redress.<sup>3</sup>

There is no substantial reason why this principle should not be applied to the by-laws or rules and regulations of unincorporated associations, and the precedents are directly that way.

In *Austin vs. Searing*,<sup>4</sup> the question discussed was as to the

<sup>1</sup> Examine, in this connection, rule of Stock Exchange as to paying debts, submitting differences, etc.

<sup>2</sup> Ang. & Ames on Corps. (10th ed.) § 341.

<sup>3</sup> *Player vs. Archer*, 2 Sid. 121;

*Loudon vs. Bernardiston*, 1 Lev. 16;

*Ballard vs. Bennett*, 2 Burr. 778;

*Middleton's Case*, Dyer, 333 (a).

<sup>4</sup> 16 N. Y. 123.

validity of a by-law which undertook to confer judicial powers upon a body of officers of the association, with power to adjudicate upon alleged violations of rules, and to decree a forfeiture of the rights to such property as the parties violating the rules were possessed of as members of the association. The court said: "But, were it distinctly averred that the defendants had subscribed the constitution of the grand as well as of the subordinate lodge, I should still be of the opinion that public policy would not admit of parties binding themselves by such engagements. The effect of some of the provisions of these constitutions is to create a tribunal having power to adjudicate upon the rights of property of all the members of the subordinate lodges, and to transfer that property to others; the members of this tribunal being liable to constant fluctuations, and not subject in any case to the selection or control of the parties upon whose rights they sit in judgment."

To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunal for themselves, in any specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. A contract that the parties will submit confers no power upon the arbitrator; and, even where there is an actual submission, it may be revoked at any time. The law allows the party up to the last moment to ascertain whether there is not some covert bias or prejudice on the part of the arbitrator chosen. It would hardly accord with this scrupulous care to secure fairness in such cases that parties should be held legally bound by an engagement, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuations.<sup>1</sup>

<sup>1</sup> See also *White vs. Brownell*, 3 *change vs. State*, 54 Ga. 668; *Den-Ab. Pr.* (n. s.) 318; s. c. on appeal, *nis vs. Kennedy*, 19 Barb. (N. Y.) 4 id. 162, 198; *Savannah Cotton Ex-* 527.

So, in the case of *Heath vs. President of the Gold Exchange*,<sup>1</sup> the effect of a clause in the constitution of an unincorporated association was considered, providing that "it shall be the duty of said committee (arbitration) to take cognizance of, and exercise jurisdiction over, all claims and matters of difference between the members of the board, and their decision shall be binding." The plaintiff, at the commencement of his action, was a member of the Gold Exchange, and sought to restrain the defendant, by injunction, from proceeding to hear and determine, under such clause, a dispute between himself and other members of the body. Subsequent to the suit, and before the argument for a perpetual injunction had been heard, the plaintiff resigned his membership in the Exchange.

It was held: 1. That before a member could be bound by the constitution and by-laws of such a body, it must appear that he personally assented to the same.<sup>2</sup> 2. That the most that could be claimed for the arbitration clause in question was, that it should have the same force and effect as an agreement in writing, made by persons to submit to the decision of one or more arbitrators any controversy existing between them, and that the plaintiff had the right to revoke and annul the power to arbitrate; that by resigning from the board this was conclusively established; and that any attempt afterwards to arbitrate claims by the board was null.

The decision was placed upon the ground that the enforcement of arbitration agreements was against public policy; and that, as courts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than mere private arbitrators, such agreements would not be enforced either in law or equity.<sup>3</sup>

<sup>1</sup> 7 Ab. Pr. (n. s.) 251.

<sup>2</sup> *Austin vs. Searing*, 16 N. Y. 112. But see as to this *White vs. Brownell*, 4 Ab. Pr. (n. s.) 162, 193.

<sup>3</sup> The following cases were cited on the last point: *Russell's Arbitrator*, 147; 2 Story Eq. Jur. § 1457; 1 id. § 607; *Kill vs. Hollister*, 1 Wils. 129;



Upon this question of the right of a member to apply to the courts, there is another article of the constitution of the New York Stock Exchange which is important to be considered.

By the 22d Article of that constitution it is declared that "any member of the Stock Exchange who shall himself, or whose partner or partners shall, apply for an injunction or legal instrument restraining any officer or committee of the Exchange from performing his or its duties under the constitution and by-laws, shall by that act cease to be a member of the association."

The general effect and meaning of a provision similar to the above has been before the courts on several occasions. If the intention of the enactment is, to prevent a member from appealing to the courts from an arbitrary and illegal decision against his rights and privileges as a member of an association, which he otherwise would be deprived of, it seems that such provision would be abortive and illegal.

In the case of *Sewell vs. Ives*, hereafter referred to,<sup>2</sup> this provision was invoked by the Exchange against the plaintiff, but the court passed it without notice, and determined the case upon other grounds. So, in *Leech vs. Harris*,<sup>3</sup> it was said: "It is not alleged that he has in any manner offended against the rights or interests of the Board of Brokers, or failed in his duty as a member thereof, unless his refusal to submit to its claim of authority in this case can be construed into an offence against his duty as a member of the board.

*Street vs. Rigby*, 6 Ves. 818; *Agar vs. Macklew*, 2 Sim. & S. 418; *Milnes vs. Gery*, 14 Ves. 408; *Thompson vs. Charnock*, 8 Term, 139; *Haggart vs. Morgan*, 5 N. Y. (1 Seld.) 422. See also *Lloyd vs. Loaring*, 6 Ves. 772; *Mitchell vs. Harris*, 2 Ves. Jr. 129, and N. Sumner's ed.; *Simmons vs. Monier*, 29 Barb. 419; *Smith vs. Compton*, 20 id. 262.

<sup>1</sup> *Austin vs. Searing*, 16 N. Y. 123; *Heath vs. President, etc., of Gold Exchange*, 7 Ab. Pr. (n. s.) 251; *White vs. Brownell*, 4 Ab. Pr. (n. s.) 162.

<sup>2</sup> Ante, p. 74.

<sup>3</sup> 2 Brews. (Pa.) 571.

If he is right in resisting the authority which the board claims over him, then he has committed no offence against his duty as a member. In such case, his right of self-protection justifies him in his action, and he more faithfully discharges his duty as a member of the board in resisting its encroachments than he would in submitting to its unlawful authority. He becomes not only the vindicator of his own rights, but the vindicator and defender of the rights of every member of the board, and of the well-being and integrity of the board itself."

The English courts have also emphatically, through James, L. J.,<sup>1</sup> endorsed this view. "The Stock Exchange is not an Alsatia. The Queen's laws are paramount there, and the Queen's writ runs even in the sacred precincts of Capel Court."

But where the association, in expelling or disciplining a member, acts within the sphere of its authority in enforcing rules which are not contrary to law or public policy, the courts will not interfere.<sup>2</sup>

So where a member of a Stock Exchange signs or agrees to a constitution in which is contained a provision referring all differences between members to an Arbitration Committee, and such committee proceeds in the mode pointed out by the organic law, giving full notice and ample opportunity to be heard, it has been held that a member is bound by the result, and a court will not interfere in the matter.

In the case of *Sonneborn vs. Lavarrello*,<sup>3</sup> the plaintiffs and defendants, members of the New York Produce Exchange, had voluntarily submitted to the Arbitration Committee thereof (chosen in pursuance of § 5 of ch. 359, Laws of 1862) a dispute arising out of a transaction in petroleum. The com-

<sup>1</sup> Ex parte Saffery, 4 L. R. Ch. D. 561.

<sup>2</sup> See cases cited ante, under sub.(b.) of § 8, ch. 2.

<sup>3</sup> 2 Hun (N. Y.), 201.

mittee having decided in favor of the defendants, the plaintiffs brought this action to restrain them from entering judgment on the award, on the grounds that the arbitrators had not been sworn, and that they had received illegal evidence. It was held, that the plaintiffs, by appearing before the committee, making their statements, discussing their case and the whole controversy, and interposing no objection to the proceedings in any respect, had waived any such irregularities on the part of the arbitrators. The power to adjourn rests in the sound discretion of the committee; but its proceedings in this respect are nevertheless subject to review, and may be annulled if it appear that the discretion has been abused.<sup>1</sup>

So when a member of the New York Stock Exchange, cited by another member to account for a sum of money claimed, voluntarily pays the same with full knowledge of all the facts, he cannot recover back the money. Fear of the Arbitration Committee before which the claim was adjusted is not duress.<sup>2</sup>

<sup>1</sup> See also *Lafond vs. Deems*, 81 N. Y. 507, at 514, per Miller, J.

<sup>2</sup> *Quincy vs. White*, 63 N. Y. 370; reversing 5 Daly, 32. In *Scott vs. Avery* (5 House of Lords Cas. 845), the Lord Chancellor (Cranworth), after stating the nature of the action and the pleadings, said: "There is no doubt of the general principle which was argued at your lordship's bar, that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases. Perhaps the first case I need refer to was a case decided about a century ago—*Kill vs. Hollister* (1 Wils. 129). That was an action on a policy of insurance, in which there was a clause that, in case of any loss or dispute, it should be referred to arbitration. It was decided there that an action would lie, although there had been no reference to arbitration.

"Then, after the lapse of about half a century, occurred a case before Lord Kenyon, and, from the language that fell from that learned judge, many other cases had probably been decided which are not reported; but in the time of Lord Kenyon occurred the case which is considered the leading case upon this subject, the case of *Thompson vs. Charnock* (8 T. R. 139). That was an action upon a charter-party in which there was a stipulation that if any difference should arise it should be referred to arbitration. That clause was pleaded in bar to the action which had been brought upon a breach of the covenant with an averment that the defendant had been, and always was, ready to refer the matter to arbitration. That was held to be a bad plea, upon the ground that a right of action had accrued, and that the fact that the parties had agreed that the

A dispute between an association and a party claiming to be a member, as to whether such party is a member or not, is not a dispute between the association and such a person, *as member*, and consequently is not a case within a by-law, or statutory provision requiring disputes between a member and the society to be decided by arbitration. And where the trustees or officers of an association deny the right of a person to be a member of the society, they are estopped from saying that the dispute is one between the parties, *as members*, within the rule.<sup>1</sup> The matters in dispute, which are the subject of reference and decision under the constitution and by-laws of associations and incorporations, as a general rule, are only

matter should be settled by arbitration did not oust the jurisdiction of the courts.

"Just about the same time occurred a case in the Court of Common Pleas, when that court was presided over by Lord Eldon—the case of *Tattersall vs. Groote* (2 Bos. & P. 131). That was an action by the administratrix of a deceased partner against a surviving partner for not naming an arbitrator, pursuant to a covenant in the deed of partnership. To that action there was a demurrer, and the demurrer was allowed. But that case, I think, can afford very little authority in the present action, or in actions similar to the present, because there the covenant was only that if any dispute arose between the partners, they would name an arbitrator. One of the partners died, and his administratrix brought an action, and Lord Eldon pointed out that the covenant did not apply to a case where one of the partners was dead and an action was brought by his representatives. Therefore, in truth, that amounts to no decision whatever upon the general question. There was then a case before Sir Lloyd Kenyon at the Rolls, of *Halfhide vs. Fenning* (2 Bro. C. C. 336), in which

he held a different doctrine. That was a bill for an account of partnership transactions. The plea to that bill was that the articles contained an agreement that any difference which should arise should be settled by arbitration, and the Master of the Rolls allowed that plea. But I think that case cannot be relied upon, because it has been universally treated as having proceeded upon an erroneous principle. There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect to that right of action. Now, this doctrine depends upon the general policy of the law, that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals. But surely there can be no principle of policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration. It appears to me that, in such cases as that, the policy of the law is left untouched."

<sup>1</sup> *Prentice vs. London*, L. R. 10 C. P. 679.

such matters as are in dispute between the society and its members, *as members*, and not extraneous matters of any kind. Thus, where a building society loaned money to a member on mortgage of leasehold property, and the member covenanted to observe and fulfil the rules of the society, and also to pay the rent reserved by the lease, and the trustees of the society sued for breaches of both those covenants, it was held that as some part of the plaintiff's claim was not a matter in dispute between the society and the defendant, *as member*, but only *as mortgagor*, the society was not bound by its rule to refer to arbitration the subject-matter of the action.<sup>1</sup>

<sup>1</sup> *Morrison vs. Glover*, 4 Ex. 430. It is not an unusual thing for the statutes incorporating associations to oust the jurisdiction of ordinary tribunals, and to refer all disputes, either between the members themselves or between the members and the association thereof, to certain persons or classes of persons named by the statute, whose jurisdiction is exclusive and whose decision is final. Thus, the statute of 6 & 7 William IV. c. 32, incorporating the provisions of 10 Geo. IV. c. 56, relating to the formation of friendly societies, provides that rules shall be made by such societies directing whether disputes shall be settled either by justices of the peace or by arbitrators; and, when rules have been adopted to that effect, it has been held that any decision made by such justices of the peace, or by such arbitrators, was final, and a rule for a mandamus to compel the judge of the county court to proceed in such an action was denied (*Ex parte Payne*, 5 D. & L. 679). The same is true under the "Act to Consolidate and Amend the Laws relative to Savings-banks" (9 Geo. IV. c. 92, § 45), by which it was provided that any dispute arising between the

bank and the depositor should be decided by arbitrators appointed in the manner provided by the statute. It was held that the right of a depositor to bring an action in a court of law for any matter coming within the purview of the provisions of the statute was barred by the statute; and it was held that the language of the statute, which was that "the matter so in dispute *shall* be referred," etc., gave the arbitrators an exclusive, and not merely concurrent, jurisdiction (*Crisp vs. Bunbury*, 8 Bing. 394). (This 45th section of the act is omitted in the edition of the Statutes of 1875.) So, in the Act relative to Loan Societies (5 & 6 Wm. IV. c. 23, § 8), it was provided that all notes and securities entered into for the payment of loans might be prosecuted, upon default, by the treasurer; and that it should be lawful for one or more justices of the peace to summon, etc., the person complained of, etc. In construing this statute, it was held that the jurisdiction of the higher courts was ousted, if not by the express words of the statute, at least by implication (*Timms vs. Williams*, 3 Q. B. 413; but see, contra, *Albon vs. Pyke*, 4 M. & G. 421, and note, 426).

*IX. Liability of Seats in Exchange to Legal Process.*

The general nature of seats in an unincorporated Stock Exchange has already been considered in Section V. of this chapter, and we have seen that its members have no separate or severable interest in its property, and no right to call for an account of the same, or its accumulations, with a view of dividing it, as in the case of ordinary partners.

The question now is, as to the right of outside creditors to attach or seize this seat, upon attachment or execution, to satisfy their claims.<sup>1</sup>

In the first place, it will be observed that, as between the owner or member and the association, the seat is regarded, and has been recognized, as a right or property of a valu-

And where a bill in equity was brought, by a holder of shares in a building society, against the society and its directors, for misconduct, and praying a declaration that the plaintiff was not bound by certain rules, etc., it was held that this was a dispute for the decision of which arbitrators were the proper authority under the statute of the society's incorporation (6 & 7 Wm. IV. c. 32); and that it was not only provided by the statute that such disputes should be referred to arbitration, but that it was against the policy of the law, as shown by the statute, to drag the disputes of friendly benefit societies into the courts, etc. (*Thompson vs. Planet Benefit Building Soc.* 15 L. R. Eq. 333). But the jurisdiction of the superior courts is only to be ousted by express words, or by necessary implication (*Cates vs. Knight*, 3 T. R. 442; *Crisp vs. Bunbury*, 8 Bing. 394; and *Albon vs. Pyke*, *supra*).

<sup>1</sup> The rules of the New York Stock Exchange provide as follows, in relation to seats:

Article X. § I. of the Constitution provides that all applications for membership shall be publicly announced; and § II. states the qualification of the member. Article IV. sub. Third, provides for the admission of members by two thirds of the committee on admissions, which committee shall determine the manner and form in which their proceedings shall be conducted. Any member wishing to transfer his membership shall submit the name of the proposed transferee to the Committee on Admissions; and, on the approval of two thirds of said committee, the transfer may be made, "provided the member transferring has no unsettled contracts" (Art. XIII. § I.). Upon the death of a member, his membership may be disposed of by the said committee; who, after satisfying the claims of the members, shall pay any balance to the legal representatives of the deceased (*ibid.* § II.).

Elaborate provision is also made for the suspension and readmission and expulsion of members.

able nature, of which the owner cannot be deprived, except in accordance with the rules of the organization, and that a court will interfere by an injunction, or other appropriate legal remedy, to prevent such deprivation.

But, on the other hand, it is equally well settled, as we have seen, that the ownership of a seat in such association is not absolute and unqualified, but it is limited and restricted by the rules of the body issuing the same. The owner cannot sell the seat to a person whom the body will not recognize.<sup>1</sup> He cannot devise or bequeath the same, so that his heirs or personal representatives will be able to use and enjoy it as the testator has, for the seat is a mere personal privilege, dying with the member, and not containing any inheritable qualities.<sup>2</sup> The proceeds of his seat, it is true, may belong to his personal representatives, but the franchise or right of exercising the occupation of Broker in the Exchange is gone.

Moreover, a member may be entirely deprived of the benefits and value of the seat by a violation of the rules of the association.<sup>3</sup>

A seat, therefore, in one of these bodies, is a species of incorporeal property—a personal, individual right to exercise a certain calling in a certain place, but without the attributes of descendibility or assignability which are characteristic of other species of property.<sup>4</sup>

By far the most numerous class of cases in which the legal character of seats has arisen are those in which seats have been sought to be attached or seized on execution by creditors of an insolvent member. Carrying out the principles just alluded to, the courts have uniformly held that the

<sup>1</sup> *White vs. Brownell*, 3 Ab. Pr. (n. s.) 318; *Leech vs. Harris*, 2 Brews. New Cas. 67, Sp. T. (Pa.) 571.

<sup>2</sup> *Id.*

<sup>3</sup> *Ritterband vs. Baggett*, 4 Ab. New Cas. 67, Sp. T.

<sup>4</sup> Compare, as to character of market-stands, *Barry vs. Kennedy*, 11 Ab. Pr. (n. s.) 421.

right of a member to a seat in a Stock Exchange cannot be attached<sup>1</sup> or seized on execution.<sup>2</sup>

By the rules of the Philadelphia Stock Exchange, it was provided that a member might sell his seat to any person whom the association should elect; that the proceeds of such sale shall belong to the creditors of the owner who are members of the association, and the balance, after paying their claims, shall go to the owner. The court held, that such seat was not properly subject to execution in any form. It was a mere personal privilege; perhaps, more accurately, a license to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce. Nor is it within either the words or the spirit of the act of June 16, 1836, § 35 (Pamph. L. 767), providing for attachment on judgments.

"Whether," says the court, "the proceeds of the sale of the seat, in the hands of the treasurer of the board, and payable to the defendant, according to the regulations and by-laws of the board, could be thus reached, is an entirely different question. This, and no more, is what we understand to have been decided by the Supreme Court of the United States, in *Hyde vs. Woods*,<sup>3</sup> where Mr. Justice Miller says: "If there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee in bankruptcy."<sup>4</sup>

The case of *Thompson vs. Adams*<sup>5</sup> is another interesting case on this subject, holding that a third person, secretly fur-

<sup>1</sup> *Pancoast vs. Houston*, Phila. C. Alb. L. J. 414; s. c. 36 Phil. Leg. Int. P. 17 Alb. L. J. 172; s. c. 5 Week. 86. <sup>3</sup> 4 Otto, 525.  
Notes Cas. 36. <sup>4</sup> *Pancoast vs. Gowen*, 20 Alb. L. J.

<sup>2</sup> *Hyde vs. Woods*, 94 U. S. (4 414.  
Otto) 525; *Pancoast vs. Gowen*, 20 <sup>5</sup> 7 Week. Notes of Cas. 281.



nishing money to a member to purchase his seat, has no claim for the money until after the debts are paid to the members of the board. The Supreme Court of Pennsylvania held, in that case, that a seat in the Philadelphia Board of Brokers was not property in the eye of the law, and could not be seized in execution for the debts of the members; it was the mere creation of the board, and was to be held and enjoyed with all the limitations and restrictions which the constitution of the board have put upon it; and, under the constitution and by-laws of the Philadelphia Board of Brokers, the secret equitable owner of a seat therein has no right as against members of the board, who are creditors of the legal owner, to share in the proceeds of the sale of the seat on the death of the latter. The plaintiff in that case was not a member of the board, but had furnished the money by which the deceased member had obtained his seat, but plaintiff's name was not known to the board in connection with the seat. The rules of the board provided that all claims upon the seat of a dead member should be decided by the Arbitration Committee, and such claims were so passed upon in this case. The court said: "His [plaintiff's] contention is that he was the equitable owner of the seat, and had title to what was received for it, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger, unknown to the association. The members give credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in this regulation."

In *Evans vs. Wister*,<sup>1</sup> the same court held that an attach-

<sup>1</sup> 1 Week. Notes of Cas. 181; s. c. 32 Leg. Int. 354.

ment would not lie against the Board of Brokers for the proceeds of the sale of a seat of a member, he being indebted to his fellow-members to the amount of the proceeds. In that case one W., being a member of the board, became insolvent. Subsequently he sold his seat, but the purchaser was informed by the secretary that the transfer could not be completed until the price of the seat was paid to him, to be held for the creditors of W. in the board. Plaintiff then presented his claim to the Arbitration Committee, but the same was disallowed. He thereupon began a suit, attaching the money in the hands of the secretary, with the above result.<sup>1</sup>

In the suit of the Grocers' Bank vs. Murphy, Mr. Justice Van Hoesen, in the New York Court of Common Pleas,<sup>2</sup> passed upon the question whether a seat in the New York Stock Exchange may be regarded as property subject to conversion by legal process against the owner. An execution in this case was issued upon a judgment in favor of plaintiff, and subsequently an order was granted requiring the defendant to appear before the court to make discovery on oath concerning his property, etc., under section 292 of the Code of Procedure; and, it appearing that the defendant possessed a seat in the New York Stock Exchange, plaintiff asked to have it assigned, and the proceeds applied towards the satisfaction of his judgment. The court, in denying a motion requiring defendant to make the assignment, said, "There is no doubt, if a seat be sold, the proceeds of the sale, after the payment of claims due to members of the board, may be reached by proper process. This is the view of every court which has had occasion to express an opinion on the subject. It by no means follows, however, that the seat itself may be

<sup>1</sup> This was an affirmance of *Leech vs. Leech*, 3 Week. Notes of Cas. 542, March 12, 1881, where dissenting note. opinion of Van Brunt, J., is also re-

<sup>2</sup> N. Y. *Daily Reg.* June 14, 1880; reversed on appeal, N. Y. *Daily Reg.* June 14, 1880; s. c. 11 N. Y. *Weekly Dig.* 538.

seized by the sheriff, or taken possession of by a receiver. It may well be doubted if a seat in the Exchange be property. It is true that Mr. Justice Miller, of the Supreme Court of the United States, in the case of *Hyde vs. Woods*,<sup>1</sup> said that he thought it was property; but the Supreme Court of Pennsylvania, in two carefully considered decisions, in which the decision of Mr. Justice Miller was thoroughly reviewed, came to the opposite conclusion. . . . A seat in the Exchange does not fall within any of the classes into which the subjects of property are divided. It is not capable of manual delivery or appropriation; it is not a domestic animal, nor a product of labor or skill, nor a right created by statute."

But, upon appeal, this decision was reversed by two of the judges, the third judge dissenting, and coinciding with Mr. Justice Van Hoesen.<sup>2</sup>

Mr. Justice Beach, in delivering the opinion reversing the decision of the court below, after reviewing the cases, held that, under the section of the code in question, the defendant was bound to apply the proceeds of the seat to the satisfaction of his debts; and that if this result were not correct, the legal principle which makes the debtor's possessions liable to his creditors would be nullified. "Probably an order appointing a receiver, containing directions for the judgment debtor to do whatever may be deemed needful to transfer the seat under the rules of the Exchange, would accomplish the result sought." In another case,<sup>3</sup> a peremptory mandamus, directed to the defendant, compelling it to transfer to the relator, who had purchased the same at a sheriff's sale, a seat in the Cotton Exchange, was refused upon the grounds heretofore adverted to in the preceding cases. If the seat were subject to direct legal process, it is very evident that the whole design

<sup>1</sup> 94 U. S. (4 Otto) 523.

<sup>3</sup> *Allen, Jr., vs. The New York Cotton Exchange*, id. March 31, 1880.

<sup>2</sup> *N. Y. Daily Reg.* March 12, 1881.

of the organization would be thwarted by introducing into the Exchange the purchasers at a judicial sale, without a compliance with the prerequisite rules of admission and against the wish of the regular members. This the courts have uniformly refused to do.

But the courts, through the instrumentality of their equity powers, or by process in aid of execution, will compel an insolvent member to sell his seat to some person whom the association will recognize, and apply the proceeds to the satisfaction of his debts. It would be a failure of justice to allow an insolvent to be the possessor of such a valuable right or property, to the defiance of his just creditors.

So, in a case<sup>1</sup> where a receiver instituted an action to compel a debtor member of a Produce Exchange to convey his seat to a member-elect, with whom the receiver might contract for its sale, the court said :

“The appointment of plaintiff as receiver of Baggett, made in the supplemental proceedings under the code, vested in him the legal title to all the personal property of Baggett. By force of the statute, Code 298, the receiver of the judgment debtor is subject to the direction and control of the court in which judgment was obtained upon which the proceedings are founded. This action was commenced by leave granted by this court, and the receiver’s appointment confers upon him the right to make discovery, on defendant’s oath, of all his property. I am of the opinion that the seat in the Cotton Exchange was an incorporeal right which Baggett had at the time he became bankrupt, and was in the fullest sense property, and that the franchise and privileges secured to the Exchange by its charter and high price of the initiation fee show that it was valuable property. Nor can I doubt that had there been no supplemental proceedings under which a receiver was

<sup>1</sup> Ritterband vs. Baggett, 4 Ab. New Cas. 67.

appointed it would have passed, subject to the rules of the Cotton Exchange, to his assignee in bankruptcy; and if there had been left in the hands of the members of the board any balance, after paying the debts due to the members, and all penalties and charges, that balance might have been recovered by the assignee. The question whether the seat in the board was property has been fully settled in a late case, almost if not entirely, identical with the case at bar.<sup>1</sup> The question being settled that the seat in question is property of value, I think it is the duty of the court to enforce its transfer for the plaintiff's benefit in this action, either to a receiver or to a third person qualified to work out the designs of the law. We have seen that the personal estate of the debtor becomes vested in the receiver from the time, and by virtue, of his appointment. The entry of the order appointing the receiver places the title of all the personal property in him. The provisions of the Code relating to supplemental proceedings were enacted for the purpose of making the property of the debtor available assets in his hands to pay his debts. By a by-law of the Exchange this property cannot be assigned to any one but members and to members-elect. It cannot, therefore, be assigned to the receiver, as he is neither a member nor a member-elect. If this property cannot be reached by the receiver unless some mode is presented, the object and intention of the Code become not only a dead letter, but lifeless in spirit. Rights of property, from time immemorial, could be reached by a creditor's bill; and it is now well settled that the same result may be accomplished by proceedings under the Code, which furnish a substitute for that proceeding in chancery. Personal property passes to the receiver without assignment; but if an assignment be necessary to effect the purpose of the law, I do

<sup>1</sup> *Hyde vs. Woods*, 94 U. S. (4 Otto) 524. See also *Nicholls vs. Eaton*, 91 U. S. 716.

not question the power of the court to direct it to be done. I therefore direct an assignment to be made to Mr. Covas or some other competent and fit member of the Cotton Exchange, with apt and proper directions." So in the recent matter of Ketcham, bankrupt,<sup>1</sup> on an application for an order requiring the bankrupt to make transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee might procure as a purchaser of the seat, Judge Choate, in the United States District Court, in a lengthy decision, said: "The real question is whether the right or privilege which the bankrupt holds as a member of this Stock Exchange is to be regarded as property which passes to his assignee in bankruptcy, under the Bankrupt Law, for the benefit of his creditors. If it is, then whatever it may be necessary for the bankrupt to do to make the right available to the assignee he will be required to do. The seat, however, has an actual pecuniary value which the rules of the society, as interpreted and applied in practice, permit the holder to realize by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest, for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid, and the right or privilege is, to all intents and purposes, a business right, or privilege for business purposes only. I see nothing in the rules of the Exchange which renders it impossible for a seat to be disposed of by the assignee with the co-operation of the bankrupt, subject to the condition above mentioned. This seat in the board was actually used as a part of the business capital of these bankrupts as Stock-brokers. To suffer the bankrupt still to hold it virtually withdraws several thousand dollars in value of his business assets from his creditors." The court reviewed several cases some-

<sup>1</sup> N. Y. *Daily Reg.* Feb. 9, 1880; s. c. more fully, 9 Rep. 305.

what analogous, one of which was touching a stall in a market, in which it was determined that the transfer could not be made without the consent of the city authorities, and concluded as follows: "The controlling consideration is, as it seems to me, that practically, and whatever its form or incidents with respect to other matters may be, it is a part of the bankrupt's business assets, or, more generally, of his property, which it was the primary design of the Bankrupt Law to distribute among his creditors; and that the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the Bankrupt Law, unessential, mere technical cobwebs which the law is strong enough to break through." An order was directed to be entered requiring the bankrupt to execute any transfer, assignment, or other instrument necessary for the purpose of vesting the title of his seat in the New York Stock Exchange in such person as the assignee in bankruptcy might procure.<sup>1</sup>

And in the case of *Campbell vs. The New York Cotton Exchange*,<sup>2</sup> the plaintiff, a receiver, set up a judgment in favor of one *Weeks vs. Talcott*; the ownership by Talcott of the certificate of a seat in the Cotton Exchange; that the by-laws provide that on the surrender by a member of his certificate to the treasurer of the Exchange, "a transfer should be made by him to a member or member-elect only;" and that "any member may purchase said rights of membership of any other member, which shall give him the right to sell the same to any other member or member-elect;" that plaintiff, as receiver in *Weeks vs. Talcott*, prior to the commencement of this ac-

<sup>1</sup> These decisions were cited and denied an application for an injunction to restrain the president of the of Grocers' Bank vs. Murphy, N. Y. New York Stock Exchange from disposing of, or interfering with, the C. P. 11 N. Y. *Weekly Dig.* 538; s. c. in full, N. Y. *Daily Reg.* March 12, 1881. proceeds of a member's seat in the See also Scott vs. Ives, N. Y. *Daily Exchange.*  
<sup>2</sup> N. Y. *Daily Reg.* Jan. 11, 1881.

tion, received an offer from one M., a member, in good standing, of the Exchange, of \$1000 for said seat; that Talcott refused to execute the necessary transfers, and the suit is brought to compel such transfer, it being alleged that Talcott has no other property. The corporation demurred to the complaint, claiming that it was improperly joined as defendant, there being no suggestion that the Exchange would refuse to abide by its rules and by-laws, and that the court was bound to assume that when the time came, and the necessary conditions precedent were performed, the Exchange would do what it ought to do.

But the demurrer was overruled on the ground that the plaintiff's equitable cause of action comprehended a consummated assignment of the seat; or, in other words, a complete vesting of the right to a seat, which could not be accomplished without the defendant the New York Cotton Exchange's co-operation. It is therefore a necessary party to the action. There is no more trouble substantially connected with the defence of the action than would be involved in the defendant's scrutinizing any set of circumstances which would be presented to it with a demand of transfer under the rules.

The defendant should receive due indemnity by the exercise of the court's discretion as to costs.

All of the cases can be reconciled by keeping in view the circumstances under which they arose; and the following propositions may be deemed as settled:

1. That in the disposition of a seat, or the proceeds thereof, the members of the Exchange will be preferred to outside creditors.
2. That the seat is not the subject of seizure and sale on attachment and execution.
3. That the proceeds of the seat, in the hands of the Exchange or its officers, are capable of being reached, after the claims of members have been satisfied, to the same extent



and in the same manner as any other money or property of a debtor.

4. That a person owning a seat in the Exchange can be compelled, by proceedings subsequent to execution, or under the direction of a receiver, to sell his seat to a person acceptable to the Exchange, and devote the proceeds to the satisfaction of his judgment debts. And the New York Court of Appeals has recently decided<sup>1</sup> that a patent may be reached by a creditor's bill, and the debtor cannot set up that it is invalid for want of utility, and therefore not property.

### *X. Gratuity Fund.—Life-insurance.*

The constitutions of both the New York and the Philadelphia Stock Exchanges make provision for the families or representatives of deceased members.

In the absence of actual cases, it would be useless to speculate upon the construction of the different and varied provisions by which this Gratuity Fund, as it is called, is established.

The question has arisen, however, in Pennsylvania, in regard to the right of the representatives of a deceased suspended member to recover the sum, and we content ourselves with giving that case as the only reported adjudication upon the subject.

In this case<sup>2</sup> the facts were these: One MacDowell, the father of the plaintiff, purchased a seat in the Exchange, and was elected a member August 28, 1865. In December, 1875, while MacDowell was still a member, an amendment to the constitution of the Exchange was passed, providing substantially as follows: *That every full member of the Exchange should, in addition to all other payments required of him at the time of his admission, pay into the hands of the trustees*

<sup>1</sup> Gillette vs. Bate, 24 Albany L. J. 368, Oct. 1881.

<sup>2</sup> MacDowell vs. Ackley, 8 Week. Notes Cas. 464.

\$15, and the further sum of \$15 annually, on December 1, and also the sum of \$10 upon the death of any full member. Said payments were to be charged and collected in the same manner as all other dues to the Exchange. Said trustees were to set apart the fund arising from such payments as the "Gratuity Fund," and were to pay therefrom, within thirty days after the death of any full member, the sum of \$2000 to his nominee, widow, children, or legal representatives. A full member was one owning a seat in the Exchange, whether suspended or not.

After the passage, MacDowell paid all assessments except those stated hereafter.

On November 17, 1877, the following amendment to the constitution was adopted :

*"That any suspended member who shall have failed for three months to pay in full all gratuity dues and assessments, shall forthwith cease to be a full member for the purposes of this section ; such member may be restored to such full membership by a favorable report of the Standing Committee, upon paying in full all arrears of gratuity dues and assessments."*

It was not shown that MacDowell ever expressly assented or agreed to this amendment. He failed to pay his regular quarterly dues for 1877 and for some parts of the year 1878, and several assessments due from him to the Gratuity Fund, by reason of the deaths of members, in 1877 and 1878, and continued indebted in these amounts to the Exchange until his death. In April, MacDowell became hopelessly insane, and he was subsequently, in August, duly suspended in accordance with the rules for non-payment of dues, after which no further dues or assessments were imposed upon him. In November, 1878, he died, leaving one child, the plaintiff, his sole heir, and having designated no person to whom the gratuity from the Exchange should be paid.

After his death, his seat was sold under the rules, but sufficient was not realized to pay the claims of the members of the Exchange. A portion of the proceeds of the sale of the seat were applied to the payment of said dues and assessments; said proceeds were not distributed, however, but were held by the treasurer of the Exchange. This action was brought by the guardian of the heir of MacDowell against the officers, etc., of the Exchange to recover the sum of \$2000 above provided for. Judgment was rendered for the defendant, which was affirmed by the Supreme Court, where it was held that the right of MacDowell in this Gratuity Fund was grafted on his existing membership in the Stock Exchange, and that he was bound by the amendment which had been regularly adopted. The court further held that his absence when the amendment was adopted, even if shown, could not avail; that even if he had dissented therefrom he could not have been relieved from its obligation; for, having subscribed to the constitution and by-laws, and the change having been made in accordance therewith, he could not be permitted to question its validity; he could not enjoy the benefits of the fund without performing his part towards creating it; and that his subsequent mental incapacity did not relieve him from the effect of previous neglect and refusal to discharge his legal and just duty.

In concluding this review of the general legal character of unincorporated Stock Exchanges, we find that the subjects discussed are almost new in the law, and hence we have, at great labor and expenditure of time, set forth the most important adjudications in full; from which it appears that the courts have treated these novel questions in a spirit of great fairness, and that, when analogous branches of the law have failed to furnish precedents, they have been determined upon general principles of justice and good sense.

## CHAPTER III.

ANALYSIS OF TRANSACTION BETWEEN BROKER AND CLIENT  
UPON PURCHASE OR SALE OF STOCKS IN THE UNITED STATES.

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- I. Legal Relation of Stock-Broker to his Client.*
- II. Definitions of Terms Used.*
- III. Purchase on "Long Account"—History of Transaction.*
- (a.) *The Order to Purchase—Price—Number of Shares to be Bought.*
  - (b.) *Duty and Liability of Broker in Purchasing ; Right to Indemnity.*
  - (c.) *Disposition of Stock when Purchased ; Safely Keeping same ; Liability to Keep Identical Stock Purchased, etc.*
  - (d.) *Dividends, Profits, Assessments, Calls, Interest.*
  - (e.) *Right of Client to Control and Take Up Stock.*
- IV. Duty of Broker to Sell.—"Stop Order."*
- V. Special Contract with Client.—Joint Adventures in Stocks.*
- VI. Sales for "Short Account."*
- (a.) *Nature of Short Sale.*
  - (b.) *Duty of Broker to Sell at Price Ordered.*
  - (c.) *Nature of Contract Made upon "Borrowing" Stock ; and From Whom the Stock may be Borrowed.*
  - (d.) *Duty of Broker to Close "Short" Contract by "Buying in" Stock.*
- VII. Compulsory Sale by Broker.*
- (a.) *For Failure to Put Up Margins.*

(b.) *Form of Notice; Upon Whom Served, Reasonable Time.*

(c.) *Notice of Sale for Failure to Comply with Demand for Margins.*

(d.) *Place of Sale.*

(e.) *Broker Cannot Sell or Purchase.*

(f.) *Effect of Sale or Purchase by Broker.*

# *VIII. When Broker can Close the Transaction.*

## *IX. When Broker can Act by Substitute.*

## *X. Broker's Commissions.*

## *XI. Communications between Broker and Client not Privileged.*

## *I. Legal Relation of Stock-broker to his Client.*

In the United States, the business of buying and selling stocks and other securities is generally transacted by Brokers for a commission agreed upon or regulated by the usages of the place; and although any person may enter into such an occupation, no license to perform it being necessary,<sup>1</sup> such business is now generally restricted to those

<sup>1</sup> By the statutes of Pa., the occupation of Stock-broker is regulated by statute (Brightly's Purd. Dig. 42), the substance of which is here given:

1. Stock-brokers to be licensed, etc.  
5. License to be renewed annually, etc., to enure for the benefit of assignees or legal representatives. Proceedings in such cases: Brokers not to use more than one place of business. The same person may be licensed as Stock, Exchange, and Bill Broker.  
6. Penalty for acting without license.

9. Tax on Broker's license. Three per cent. on commissions, etc.  
10. To be appraised.  
11. How classified.  
12. To make annual returns on oath.  
13. Statement of name of Broker or firm, location of business, and amount of capital engaged to be reported to the Attorney-general.  
14. Penalty for neglect.  
15. Power of Auditor-general in relation to penalties.  
16. Tax to be additional to license.

Brokers who are members of Stock Exchanges, there being one of these bodies in several of the principal cities of the Union.<sup>1</sup>

Considerable discussion has arisen in the cases, especially those in the State of New York, as to the precise relation which exists, where a Broker with his own money purchases or sells stocks, etc., for his Client, for the purposes of speculation.

Does the Stock-broker in such a transaction, in the absence of an express agreement defining the relation, unite in himself the characters of "Broker," "pledgee," and "trustee?"

The importance of this question is obvious, because, if it be answered affirmatively, it would seem to follow that all of the incidents and consequences of those characters would attach to the Broker, in his dealings with his Client; but, on the other hand, if the question be answered negatively, the simple relation of debtor and creditor, arising out of a breach of contract, would exist.

The embarrassment of the question arises from the fact that, in the case of an ordinary purchase of stocks for speculation, on a margin, the Stock-broker, without literally filling the technical definitions of "Broker," "pledgee," or "trustee," comes within the purview of all of those terms.

He is a Broker because he has no interest in the transaction, except to the extent of his commissions; he is a pledgee, in that he holds the stock, etc., as security for the repayment of the money he advances in its purchase; so he is a trustee, for the law charges him with the utmost honesty and good faith in his transactions; and whatever benefit arises therefrom enures to the *cestui que* trust.

The circumstances attendant upon an ordinary transaction between a Broker and his Client in a stock speculation are

<sup>1</sup> Philadelphia, San Francisco, and Boston.

carefully described by Hunt, Ch. J., in a leading case in the State of New York.<sup>1</sup>

“The customer employs the Broker . . . to buy certain stocks for his account, and to pay for them, and to hold them subject to his order as to the time of sale. The customer advances ten per cent. of their market value, and agrees to keep good such proportionate advance, according to the fluctuations of the market. . . .

“The Broker undertakes and agrees :

“1. At once to buy for the customer the stocks indicated.

“2. To advance all the money required for the purchase, beyond the ten per cent. furnished by the customer.

“3. To carry or hold such stocks for the benefit of the customer, so long as the margin of ten per cent. is kept good, or until notice is given, by either party, that the transaction must be closed. An appreciation in the value of the stocks is the gain of the customer, and not of the Broker.

“4. At all times to have in his name, or under his control, ready for delivery, the shares purchased, or an equal amount of other shares of the same stock.

“5. To deliver such shares to the customer, when required by him, upon the receipt of the advances and commissions accruing to the Broker ; or,

“6. To sell such shares, upon the order of the customer, upon payment of the like sums to him, and account to the customer for the proceeds of such sale.

“Under this contract the customer undertakes :

“1. To pay a margin of ten per cent. on the current market value of the shares.

“2. To keep good such margin according to the fluctuations of the market.

“3. To take the shares so purchased on his order whenever

<sup>1</sup> Markham vs. Jaudon, 41 N. Y. 235.

required by the Broker, and to pay the difference between the percentage advanced by him and the amount paid therefor by the Broker.”<sup>1</sup>

It may be well to set forth the history of an ordinary transaction between a Client and Broker, even with a little more detail than that contained in the foregoing extract. The ordinary margin paid on opening an account with a Broker—that is, in ordering him to buy or sell securities—is ten per cent.<sup>2</sup> The margin may be less than this, or frequently none is advanced, according to the confidence which the Broker has in the ability of the Client to respond to ultimate loss. But, whether the Broker advances all or only the principal portion of the sum invested in the securities, the relation of the parties is unchanged. The fact exists that the Broker looks to the principal for an indemnity upon the entire transaction. The Client, having given the Broker an order to buy or sell, either in writing or verbally, the next step in the transaction is, that the Broker goes into the Stock Exchange and executes the business, making a verbal contract therefor with another Broker. Frequently the Broker, upon receiving an order, deposes another, or subordinate, Broker to do the business. This is contrary to the general principle of law, that an agent cannot delegate his business to another—“*delegata potestas non potest delegari*,”<sup>3</sup> but it is justified by the general usage of Wall Street, of which the Client has express or implied knowledge.<sup>4</sup>

The exact transaction in the Stock Exchange is as follows :

The selling Broker offers for sale his securities, and if there is a Broker present who wishes to purchase, the contract is completed, upon his assenting to the terms mentioned.

<sup>1</sup> See also *Brass vs. Worth*, 40 Barb. 648.

<sup>2</sup> Leask's Dig., Law of Cont. 482.

<sup>3</sup> See on this subject, subdivision *Markham vs. Jaudon*, 41 N. Y. IX., “when Broker can act by substitute,” p. 230.



Where the number of shares is not named by the selling Broker, it shall be considered to be for one hundred shares of stock, of the par value of one hundred dollars, or ten thousand dollars of bonds.<sup>1</sup>

Some rules of the Stock Exchange are here given which further illustrate the transaction in the Stock Exchange:

“All offers made and accepted shall be binding.”<sup>2</sup>

“Offers to buy or sell shall be entitled to the floor in the following order:

“1. Bids ‘seller three days,’ and offers to sell ‘buyer three days,’ shall take precedence of cash and regular.

“2. ‘Cash’ and ‘regular’ bids and offers may be made simultaneously, as being essentially different propositions.

“3. Offers to buy or sell on longer options than three days may be made at the same time with offers to buy or sell ‘buyer, or seller three.’

“4. In offers to buy on seller’s option, or to sell on buyer’s option, the longest option shall have precedence.

“In offers to buy on buyer’s option, or sell on seller’s option, the shortest option shall have precedence.”<sup>3</sup>

“No party to a contract shall be compelled to accept a principal other than the member offering to contract, unless the name proposed to be substituted shall be satisfactory, or shall be declared at the time of making the offer.”<sup>4</sup>

“Whenever there is a disputed claim for the purchase or sale of a security, made during the sessions of the Exchange, the presiding officer shall decide the same, or he may appeal to the board for their decision. If an appeal be made from the decision of the presiding officer, and seconded by two members, the question shall be put to vote.”<sup>5</sup>

<sup>1</sup> Art. V. § 2, of By-laws, N. Y. Stock Exchange.

<sup>2</sup> Art. V. § 1, id.

<sup>3</sup> Art. V. § 3, id.

<sup>4</sup> Art. V. § 4, id.

<sup>5</sup> Art. VII. § 1, id.

"In any disagreement between members, growing out of the purchase and sale of a security or securities, as soon as the same is ascertained, if not settled by mutual agreement, the money difference shall be established forthwith by purchase or sale, by an officer of the Stock Exchange, wherever the Exchange may be at the time convened."<sup>1</sup>

"All purchases and sales shall be settled for on the next business day, unless expressed to the contrary."<sup>2</sup>

Sales for "cash" are settled for immediately after the purchase, upon the delivery of the same.<sup>3</sup>

In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase-money to be paid at the time and place of delivery.<sup>4</sup>

By Article XXX. of the By-laws of the New York Stock Exchange, transactions may be made in government securities for the "account" for two "settling-days"—viz., the 15th and last days of each month. Provision is also made for securing and carrying out such contracts; but, as a matter of fact, this system of dealing is rarely if ever used.

But to continue: the Brokers, in making transactions with one another, do not know for whom they are made, the names of the principals being jealously concealed. One Broker looks to the other contracting Broker to carry out the transaction, and in practice there is no attempt made to enforce any liability against the principal should he become known. Here another question arises, whether there is any liability on the part of the unknown principal for the default of his Broker? Is there any privity between him and the other contracting Broker? We shall not attempt to answer these questions in this place, but they are suggested as they arise in the history of the transaction.<sup>5</sup>

<sup>1</sup> Art. VII. § 2, of By-laws, N. Y. Stock Exchange.

<sup>2</sup> Art. XII. § 1, *id.*

<sup>3</sup> Art. XVII. Constitution.

<sup>4</sup> *Id.*

<sup>5</sup> See this subject considered, Ch. X.

There is no written contract, as a general rule, between the Brokers, each one merely dotting down the transaction made, and reporting it to his office, at which place, later in the day, the business is confirmed by comparisons made by each side.

The Statute of Frauds here looms up to destroy such contracts; but the rules of the board make them inviolable between the members in the tribunal known as the "Arbitration Committee."

On the following day, if the transaction is made "regular," the stocks are duly delivered at the office of the purchasing Broker by the selling Broker, who receives payment for them. If the sale be made on time, the transaction is completed when the time expires. The stock, when received, remains in the office of the purchasing Broker to await the further orders of the Client. Sometimes the stock is held by the Broker with merely a general power of attorney in blank attached to or endorsed on it.

"In the delivery of stock, of which but one transfer in a day is allowed, the receiver shall have the option of receiving said stock by certificate and power irrevocable, in the name of, witnessed or guaranteed by, a member of the Exchange, or a firm represented at the Exchange, resident or doing business in New York, or by transfer thereof."<sup>1</sup>

"In all transactions exceeding one hundred shares, where the delivery is by certificate and power, the purchaser shall have the right to require the delivery in certificates of not more than one hundred shares each."<sup>2</sup>

"Powers of attorney, or substitution, signed by trustees, guardians, infants, executors, administrators, or attorneys, shall not be a good delivery."<sup>3</sup>

Sometimes the stock is transferred on the books of the com-

<sup>1</sup> Art. IX. § 1, of By-laws N. Y. Stock Exchange.

<sup>2</sup> Art. IX. § 2, id.

<sup>3</sup> Art. IX. § 3, id.

pany in the name of the Broker, rarely in the name of the principal. This stock is considered as the Client's, subject only to the lien of the Broker for advances and commissions. The Broker collects the dividends, and pays assessments upon it, if any be levied, and the same remains in his hands through the whole transaction until it is sold, the Client never having possession of, and rarely ever seeing, the stock. Upon the purchase of the stock, the Broker sends a notice to his Client giving the price *and the name of the Broker from whom he has purchased.*<sup>1</sup> What effect this would have upon a contest between the unknown principal and the other, or selling, Broker is still another question. Frequently a Broker is himself a speculator, and, in executing an order for his principal, unites a purchase or sale on his own account. Finally, the Broker in many instances may have two Clients, who, at the same time, give him counter-orders, the one to buy and the other to sell, which the Broker frequently executes at the market price, but without any real sale or purchase, merely making cross-entries in his books. In the absence of any fraud or any damage to the Clients, can such transactions stand? During the time the stock or securities remain in the possession of the Broker, he uses them to raise money with which to carry on his business, and no attempt is made to keep the stocks separate, or to keep the identical certificates on hand, the Client usually being satisfied if the Broker is able to deliver the number of shares purchased, without any regard to particular certificates. According to the strict legal definition, it is manifest that a Stock-broker, in transactions such as those described above, is not embraced within the term "Broker."

<sup>1</sup> And it was decided in *Hoffman vs. Livingston*, 46 N. Y. Superior Ct. (14 J. & S.) 552, that a failure of the Broker to give this notice was such negligence as to preclude him from recovering his commissions.

"Brokers" have been defined by a standard legal lexicographer to be "those who are engaged for others in the negotiation of contracts relative to property with *the custody of which they have no concern*,"<sup>1</sup> and "Stock-brokers" as "those employed to buy and sell shares of stocks in incorporated companies and the indebtedness of governments."<sup>2</sup>

The distinctions between a Stock-broker and an ordinary Broker are tersely summarized by Woodruff, J., in his dissenting opinion in the well-known case of *Markham vs. Jaudon*,<sup>3</sup> in this language: "In the first place, the Stock-dealer who is employed, though called a Stock-broker, does not act as Broker in this transaction. It is no part of the office or duty of a Broker to pay the price. It is no part of the office or right of a Broker to receive the property, still less to take the title to his own name.\* "In this transaction he acts in a peculiar business, in his own name and on his own responsibility, protected against loss by the indemnity furnished, or by the agree-

<sup>1</sup> 1 Bouv. L. Dict., title "Broker." Ewall's Evans on Agency, 4 et seq.

<sup>2</sup> Ibid. See also *Clark vs. Powell*, 1 Nev. & M. 494, arguments of counsel pro and con. Ab. L. Dict., title "Broker." As to liability of Broker to pay taxes, etc., see § 3407, Rev. Stat. U. S. (2d ed. 1878), which provides as follows:

"§ 3407. Every incorporated or other bank, and every person, firm, or company having a place of business where credits are opened by the deposit or collection of money or currency subject to be paid or remitted upon draft, check, or order; or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes; or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker."

By the subsequent §, 3408, a tax of one twenty-fourth of one per cent. is imposed each month upon the average amount of deposits; and a like amount on the capital employed.

See also, for interpretation of this law, *Northrup vs. Shook*, 10 Blatchf. 243; *Clark vs. Bailey*, 12 id. 156, s. c. affirmed 21 Wall. (U. S.) 284; *Warren vs. Shook*, 91 U. S. 704; *United States vs. Cutting*, 3 Wall. 441; *United States vs. Fisk*, id. 445; *Clark vs. Gilbert*, 5 Blatchf. 330; *Bankers' Cases*, 11 Op. Att'y's-Gen. 482; *Selden vs. Equitable Trust Co.* 94 U. S. 419.

<sup>3</sup> 41 N. Y. 256; *Northrup vs. Shook*, supra.

\* A Broker has not the custody of the goods of his principal; he is merely empowered to effect the contract of sale or purchase on his behalf. Chitty on Cont. (11th Am. ed.) 274; Paley on Ag. 13; Story on Ag. (8th ed.) § 28 et seq.

ment to be furnished, to him. The idea of mere agency ordinarily suggested by the name Broker does not, therefore, arise out of the fact that the dealers in stocks for account of others, as to profit and loss, are called Stock-brokers. In the next place, the transaction, according to the intent and purpose of the employment of the Broker, does not contemplate that the customer will ever receive the stock, or own it. It may be that if the Broker desires to close his connection with the transaction, the customer, if he pays the cost, interest, and all commissions which the Broker has earned, or is entitled to earn, will receive the stock, whether he may so insist or not is a collateral question; and, if he be so entitled, it will nevertheless be true that this is not in pursuance of the arrangement, but a departure from it; for the intent is, that the stock shall be carried by the Broker until directed to be sold, the customer never having the title to the stock at all. And, finally, in my opinion, the transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the Broker, on condition of perfect indemnity against loss, agrees to carry through in his own name and on his own means or credit, accounting to his customer for the profits, if any, and holding him responsible for the loss.”<sup>1</sup>

Notwithstanding these technical differences, the decided inclination of the courts has been to visit a Stock-broker with all of the responsibilities of a Broker and pledgee, and, as we

<sup>1</sup> In the case of *Wood vs. Hayes*, 81 Mass. 375, it was held that where a Stock-broker advances his own money in the purchase of stocks for another, and holds the shares in his own name, the transaction stands on the footing of contract, which is strictly conditional to deliver so many shares on payment of so much money. “A Broker is an agent simply. He transacts business not for himself, but for another. He is a middle-man, a negotiator between other persons for a compensation. A Stock-broker deals in stocks of moneyed corporations and other securities for his principal. It is a calling of great responsibilities, in which punctuality, honesty, and knowledge are required.” Per *Van Vorst, J.*, *White vs. Brownell*, 3 Ab. (N. Y.) Pr. (n. s.) 326.

shall hereafter see, to confer upon him all of the advantages of those relations.

It is conceded by Mr. Justice Woodruff, and all of the advocates of his view of the law, that where the Stock-broker makes purchases of stock, etc., for his principal *for investment*, with money furnished by the latter, the relation of pledgor and pledgee exists.<sup>1</sup>

It is also conceded that when stock, etc., is purchased on a margin for the Client, it instantly becomes the property of the latter,<sup>2</sup> together with all of its future dividends and earnings;<sup>3</sup> and that the Client is entitled to the possession of such stocks, etc., upon paying the money represented in their purchase, with the commissions of the Broker.<sup>4</sup>

So it has been decided that a pledgee of stock is not liable for a loss occasioned by his neglect to sell the stock, it having depreciated in his hands till it became worthless, when, by the contract between the parties, the right to sell the stock had been conferred upon the pledgee or a third person; and the pledgee has never refused to transfer the stock for the purpose of a sale, and the pledgor has never requested that a sale should be made.<sup>5</sup>

It has also been held that a Stock-broker is not liable where spurious securities are purchased by him for a Client in the regular course of business. And if he sell stocks or securities for his principal, which turn out to be spurious, and the Broker, in consequence, repays the purchase-money to the buyer, he can recover the same from the principal.<sup>6</sup>

<sup>1</sup> Markham vs. Jaudon, 41 N. Y. 235, at 257 and 258; also Grover, J., s. c. at 247. See also Baker vs. Drake, 53 N. Y. 211, at 216.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Per Grover, J., Markham vs. Jaudon, supra, p. 247.

<sup>5</sup> Howard vs. Brigham, 98 Mass. 133; O'Neill vs. Whigham, 87 Pa. St. 394.

<sup>6</sup> Lamert vs. Heath, 15 M. & W. 486; s. c. Lambert vs. Heath, 15 L. J. Exch. 298; Mitchell vs. Newhall, 15 M. & W. 308; Westropp vs. Solomon, 8 C. B. 373.

So if the pledge be stolen from the Broker, he is not liable unless the theft arose from, or was connected with, a want of ordinary care on his part.<sup>1</sup>

Again, if assessments or "calls" are made upon stocks which a Broker holds for a Client, the liability to pay them, if any, is that of the principal, and not the Broker.<sup>2</sup> In fine, all of the benefits, liabilities, and disadvantages of ownership are attached to the principal, while the Broker has no interest in the transaction except to the extent of his commissions.<sup>3</sup>

In view, therefore, of these considerations, the better doctrine would seem to be to hold the Broker to the responsibilities of that relation; in fact, it appears difficult to conceive of any other relation which could so fully harmonize with the circumstances as that of Broker and Pledgee.

And this now seems to be the established law.<sup>4</sup>

The leading case of *Markham vs. Jaudon* was expressly overruled on the question of the measure of damages in an action for the conversion of stocks by a Broker.<sup>5</sup> It should also be

<sup>1</sup> 2 Pars. on Cont. (6th ed.) 112; *Abbett vs. Frederick*, 56 How. Pr. (N. Y.) 68. See *Arent vs. Squires*, 1 Daly, 347.

<sup>2</sup> *McCalla vs. Clark*, 55 Ga. 53.

<sup>3</sup> See the above questions considered at pp. 123, 151.

<sup>4</sup> *Gruman vs. Smith*, 81 N. Y. 25; *Markham vs. Jaudon*, 41 N. Y. 235; *Morgan vs. Jaudon* (Ct. of App.), 40 How. Pr. (N. Y.) 366; *Stenton vs. Jerome*, 54 N. Y. 480; *Baker vs. Drake*, 53 N. Y. 211; *id.* 66 N. Y. 518; *Ritter vs. Cushman*, 7 Robt. (N. Y.) 294; *Read vs. Lambert*, 10 Ab. Pr. (n. s.) 428; *McNeil vs. Tenth National Bank*, 55 Barb. (N. Y.) 59 (reversed on other points in 46 N. Y. 325); *Clarke vs. Meigs*, 22 How. Pr. (N. Y.) 340; *Brass vs. Worth*, 40 Barb. (N. Y.) 648; *Andrews vs. Clerke*, 3 Bosw. 585; *Taylor vs. Ketchum*, 5 Robt. (N. Y.) 507;

*Taussig vs. Hart*, 58 N. Y. 425; *Thompson vs. Toland*, 48 Cal. 99; *Kenfield vs. Latham*, 2 Cal. Leg. Rec. 235; *Gilpin vs. Howell*, 5 Pa. St. 41; *Wynkoop vs. Seal*, 64 Pa. St. 361; *Esser vs. Linderman*, 71 Pa. St. 76; *Maryland Fire Ins. Co. vs. Dalrymple*, 25 Md. 242; *Baltimore Ins. Co. vs. Dalrymple*, *id.* 269; *Child vs. Hugg*, 41 Cal. 519. The same rule would seem to exist in England: *Brookman vs. Rothschild*, 3 Sim. 153, *aff'd* by House of Lords in 5 Bl. (n. s.) 165. Contrary to this view are *Hanks vs. Drake*, 49 Barb. (N. Y.) 186; *Schepeler vs. Eisner*, 3 Daly, 11; *Sterling vs. Jaudon*, 48 Barb. (N. Y.) 459, which have all been expressly overruled in the State of New York. See also *Wood vs. Hayes*, 81 Mass. 375.

<sup>5</sup> *Baker vs. Drake*, 53 N. Y. 211.



noticed that there were two elaborate dissenting opinions by Woodruff and Grover, JJ., on the question of the relation which existed between the Broker and the Client, the two judges just mentioned holding that the Brokers were not pledgees, but that they held the stock under a contract which enabled them to sell upon the failure of the Client to furnish margins. When this question came again before the court of last resort in New York,<sup>1</sup> Commissioners Earl and Reynolds both wrote opinions affirming the judgment on the specific ground that the Brokers were pledgees. But in the case of *Baker vs. Drake*<sup>2</sup> (which was not adverted to in the preceding case), overruling *Markham vs. Jaudon* upon the question of the measure of damage, Mr. Justice Rapallo, in alluding to the latter case, said: "It seems to me, after as full an examination of the subject as circumstances have permitted, that the dissenting opinions (per Woodruff and Grover, JJ., alluded to above) embody the sounder reasons." Yet, when *Baker vs. Drake* came before the Court of Appeals again in September, 1876,<sup>3</sup> the court expressly reiterated and reaffirmed three propositions laid down in the case of *Markham vs. Jaudon*, the principal one being that "the relation of Broker and Client, under the ordinary contract for a speculative purchase of stock, is that of pledgee and pledgor." From this view Rapallo and Allen, JJ., dissented.

The doctrine of *Markham vs. Jaudon* was again distinctly reaffirmed in the last-mentioned respect in *Gruman vs. Smith*.<sup>4</sup>

The theory that the relation which exists between a Stockbroker and his Client in an ordinary speculative transaction is not that of pledgor and pledgee, is mainly based upon

<sup>1</sup> *Stenton vs. Jerome*, 54 N. Y. 480.

<sup>2</sup> 53 N. Y. 211.

<sup>3</sup> 66 N. Y. 518.

<sup>4</sup> 81 N. Y. 25, reversing 12 J. & S.

the argument *ab inconvenienti*. It is said that as stocks are a fluctuating species of property, whose value is liable to be wiped out in a moment, the burden should not be put upon a Broker to give his Client notice of a decline or rise, as the case may be, and to make a demand for further margins. But this argument is just as forcible when applied to the undisputed case of a pure pledge, where it is conceded that there must be notice to the pledgor before a sale can be made, as where the owner of stocks pledges them to secure borrowed money. In this instance, although the stocks are liable to decline and leave the lender without security, it is clear that, in the absence of express agreement, they could not be sold without legal notice.<sup>1</sup> So it has been held that where, instead of money, the Client deposits stock, etc., as margin, the relation of pledgor and pledgee exists.<sup>2</sup>

The Broker may always, in the outset, protect himself against the fluctuations of an advance or decline in the market by exacting sufficient margins to meet the contingencies of speculation; and if he neglect to do this, he should not expect the law to aid him.

But, finally, the Broker may always fully insure himself by making a special contract with his Client,<sup>3</sup> which will enable him to dispose of securities in any manner and at any time that may be agreed upon without notice, and such contracts the law will uphold and carry out.<sup>4</sup>

Upon the whole, while it must be conceded that there are incongruous features in the relation, there seems to be no hardship in holding that a Stock-broker is a pledgee; for, although it is true that he may advance all or the

<sup>1</sup> Schouler on Bailm. 206 et seq.

<sup>2</sup> Lawrence vs. Maxwell, 53 N. Y. 19; see also, Vaupell vs. Woodward, 2 Sandf. Ch. 143.

<sup>3</sup> See in this connection remarks of Hunt, Ch. J., Markham vs. Jaudon, 41 N. Y. 244.

<sup>4</sup> Post, subdivision (V.) of this chapter, p. 169.

greater part of the money embraced in the speculation, if he acts honestly, faithfully, and prudently, the entire risk is upon the Client, and may be enforced against him as a personal liability, irrespective of the value of the securities, which are the subject of the transaction. To introduce a different rule would give opportunities for sharp practices and frauds, which the law should not invite; and if it be true, as Mr. Justice Woodruff<sup>1</sup> puts it, that "the transaction is an executory agreement for a pure speculation in the rise and fall of stock, which the Broker, on condition of perfect indemnity against loss, agrees to carry through in his own name and on his own means," accounting to the Client for the profits, it is very questionable whether all the transactions of Wall Street could not be set aside as mere wagers.<sup>2</sup> But, as we have seen, the cases most emphatically condemn this view, except those in Pennsylvania, in one of which—viz., *North vs. Phillips*<sup>3</sup>—the Supreme Court of Pennsylvania held that the peculiar facts there developed showed that the dealings between the Client and the Brokers were in "differences" and "margins," and the purchase and sale of the stock were a mere pretence; but it is plain, from reading the opinion of the learned judge in that case, that not only was no effect given to the verdict of the jury, which found that the purchases of stocks had been made *bona fide*, but the different elements which made up the transaction between the Brokers and their Client were completely overlooked—viz., that stock was actually purchased for the Client; that it was held subject to his orders; that he would have been entitled to the dividends thereon; that he could have insisted upon the instantaneous delivery of the stock to him upon tendering the purchase-money remaining due; that, if the Brokers had failed, the

<sup>1</sup> *Markham vs. Jaudon*, 41 N. Y. 256; ante, p. 109.

<sup>2</sup> See cases cited in chapter on "Stock-jobbing." <sup>3</sup> 89 Pa. St. 250.

stock would not have passed to their assignees; and that, in fine, the Brokers were only interested in the transaction to the extent of their commissions. With great respect, therefore, we think that this case is not entitled to rank as an authority upon the question involved, especially as it appears to be directly opposed to the previous cases of *Esser vs. Linderman*<sup>1</sup> and *Wynkoop vs. Seal*,<sup>2</sup> where similar transactions were upheld.<sup>3</sup>

## *II. Definitions of Terms Used.*

There are a number of technical or well-known terms used in Wall Street which should be defined preliminarily to a discussion of this chapter.

When a person is said to be "long" of stocks, it is meant that he has purchased stocks through his Brokers or otherwise, in the expectation of a rise or advance in the market; he is then called a "bull."

To be "short" of stocks is where one sells stocks which he does not own or possess, and borrows the number of shares which he has sold from some third person to deliver to his vendee, expecting to be able to buy the stocks at a lower figure, and then return them to the person from whom he has borrowed them; he is called a "bear."<sup>4</sup>

To "carry" stocks means where a Broker or other person advances the money, or a principal part thereof, with which to purchase stocks, and holds the same subject to the orders of his Client.<sup>5</sup>

A "corner" in stocks is where the owners or holders (i. e. bulls) refuse to loan stocks to the "bears," with which to

<sup>1</sup> 71 Pa. St. 81.

<sup>2</sup> 64 Pa. 361.

<sup>3</sup> See this question fully discussed in chapter on "Stock-jobbing," under head of "Wagers."

<sup>4</sup> *White vs. Smith*, 54 N. Y. 522; *Knowlton vs. Fitch*, 52 N. Y. 289.

<sup>5</sup> *Price vs. Gover*, 40 Md. 102; *Salters vs. Genin*, 3 Bosw. (N. Y.) 250, 260.

carry out their short contracts, in which event the "bears," being unable to deliver, are compelled to go into the market or Exchange and buy the stocks at any price at which they can obtain them.<sup>1</sup>

"Wash sales" are not real sales, but are made by persons interested to each other, for the purpose of giving a fictitious value to the stock.<sup>2</sup>

A "shave" is a consideration for carrying stock for a certain time.<sup>3</sup>

A "call" is a contract by which the party signing or making the same agrees, in consideration of a certain sum, to deliver, at the option of a party therein named, or his order or bearer, securities therein mentioned, at a certain day for a certain price.<sup>4</sup>

A "put" is also an option contract, except the party holding the same has the option of delivering securities to the maker.<sup>5</sup>

A "straddle," or "spread-eagle," combines the advantages of a "put" and a "call," being a contract by which the holder has the right or option either to deliver or have delivered to him certain stocks at prices designated in the writing.<sup>6</sup>

<sup>1</sup> Cameron vs. Durkheim, 55 N. Y. 425, 438. See also chapter on "Stock-jobbing."

<sup>2</sup> Bryan vs. Baldwin, 52 N. Y. 232, 236; aff'g 7 Lans. (N. Y.) 174.

<sup>3</sup> North vs. Phillips, 89 Pa. St. 250-255.

<sup>4</sup> The following is a copy of the call commonly used:

"NEW YORK, 1881.

"For value received, the bearer may call on me for shares of the common stock of the Railroad Company at per cent., any time in days from date. The bearer is entitled to all dividends or extra dividends declared during the time.

"Expires 1881, at 1½ P.M.

"Signed, ."

By the usage of Brokers, it is negotiable, and it has been declared valid by certain courts. See title "Stock-jobbing," under head of "Wagers."

<sup>5</sup> It is as follows:

"NEW YORK, 1881.

"For value received, the bearer may deliver me shares of the common stock of the Railroad Company at per cent., at any time in days from date. The undersigned is entitled to all dividends or extra dividends declared during the time.

"Expires at 1½ P.M.

"Signed, ."

<sup>6</sup> Harris vs. Tumbridge, 8 Ab. New Cas. 291; aff'd 83 N. Y. 92, where the

*III. Purchase on "Long" Account.*

We have already seen what the relation is where a Stock-broker contracts to buy stocks for a Client on a margin for speculation, and advances all or the greater portion of the purchase-money;<sup>1</sup> and that, after such purchase, the Broker immediately acquires a lien upon the stocks, for the balance of the purchase-money in excess of the margins received, which he has advanced to pay for the stocks, and becomes, in relation thereto, a pledgee, with the full powers and responsibilities of that position.<sup>2</sup>

It is proposed to examine, under this subdivision, with some detail, the duties of the Broker in respect to the purchased stock, from the inception to the termination of the business.

*(a.) The Order to Purchase, Price, and Number of Shares to be Bought.*

The rule of law is that a Broker or agent, when he is directed to buy at a fixed price, must buy at that price and no

court, in speaking of a "straddle," said, "The word, if not elegant, is at least expressive. It means the double privilege of a 'put' and a 'call,' and secures to the holder the right to demand of the seller at a certain price, within a certain time, a certain number of shares of specified stock, or to require him to take at the same price, within the same time, the same shares of stock."

The following is the form of a "straddle:"

"NEW YORK, 1881.

"For value received, the bearer may call on the undersigned for shares of the common stock of the Railroad Company at per cent., any time in days from date. Or the bearer may, at his option, de-

liver the same to the undersigned at per cent., any time within the period named. All dividends or extra dividends declared during the time are to go with the stock in either case; and this instrument is to be surrendered upon the stock being either called or delivered.

"Expires at 1½ P.M.  
"Signed, ."

<sup>1</sup> See cases cited in this chapter, § I.; and see *Taussig vs. Hart*, 58 N. Y. 425; *Esser vs. Linderman*, 71 Pa. St. 76.

<sup>2</sup> *Id.* *Brookman vs. Rothschild*, 3 Sim, 153, aff'd in House of Lords, 5 Bli. (n. s.) 165; *Gruman vs. Smith*, 12 J. & Sp. (N. Y.) 389, aff'd 81 N. Y. 25.

other. Agents constituted for a particular purpose, and under a limited and circumscribed power, cannot bind their principal beyond their authority.<sup>1</sup> Accordingly, an order to buy stocks "regular" is not fulfilled by a purchase by the Broker at "seller's option, thirty days."<sup>2</sup> An order to purchase at  $57\frac{1}{8}$  is not fulfilled by a purchase at  $57\frac{7}{8}$  or 58.<sup>3</sup>

So an order to a Broker to buy 500 shares of stock, buyer's option in 60 days, at \$2 per share, is not fulfilled by the Broker's buying the same at \$1 62 $\frac{1}{2}$  per share, at 30 days, buyer's option, and then charging \$1 75, 60 days; and the Client is not liable, therefore, even though he give a note, without knowledge of the facts.<sup>4</sup> If the Broker is merely directed to buy, without any price being designated, he can make the purchase at the market price.<sup>5</sup> In respect to the amount or number of shares which the Broker may buy, he is, of course, restricted to the order. But if he cannot purchase the whole amount stated, he may purchase a less number of shares; and where a Broker receives an order to purchase securities, his undertaking is not to deliver the whole absolutely, but to buy as many of them as could be bought in the regular way, below or at the limit,<sup>6</sup> unless there is something in the circumstances to show the intention of the Client to be otherwise. An ordinary Bro-

<sup>1</sup> *Genin vs. Isaacson*, 6 N. Y. Leg. Obs. 213; *Bush vs. Cole*, 28 N. Y. 261, and cases cited; *Delafield vs. State of Ill.* 26 Wend. 221; *Story on Ag.* § 126; *Wharton on Ag.* § 712; *Maxted vs. Paine*, L. R. 4 Ex. 81; *Maxted vs. Morris*, 21 L. T. (n. s.) 535. As to where instructions are indefinite and capable of two constructions, see *Ireland vs. Livingston*, L. R. 5 H. L. Cas. 395. Nor is this rule affected by the fact that the contract made is more advantageous for the principal; *Nesbitt vs. Helser*, 49 Mo. 383; *Smith vs. Bouvier*, 70 Pa. St. 325; *Borham vs. Godfrey*, 1 Knapp, 381.

<sup>2</sup> *Taussig vs. Hart*, 58 N. Y. 425-428.

<sup>3</sup> *Genin vs. Isaacson*, *supra*.

<sup>4</sup> *Day vs. Holmes*, 103 Mass. 306; *Pickering vs. Demeritt*, 100 Mass. 416.

<sup>5</sup> As to how far the usages of the business affect the orders of the Broker, see chapter on "Usages." It has been held, however, that no usage will authorize a factor or agent to depart from positive instructions (*Barksdale vs. Brown*, 1 N. & McC. (S. C.) 517).

<sup>6</sup> *Marye vs. Strouse*, 5 Fed. Rep. 483.

ker's contract for the buying of stock, each share of which has a distinct and independent value, cannot be regarded as an entire contract.<sup>1</sup>

Accordingly, it was held<sup>2</sup> that where a Client ordered Mining Brokers to buy 500 shares of the Franklin Mining stock at the San Francisco Stock Board, and the Brokers purchased 125 shares at the latter place, and delivered 375 to their firm of the said stock belonging to one of the members of the firm, which was placed in the Client's account as a fulfilment of his order, without his knowledge, the Client was to be held for the 125 shares regularly purchased, the other shares being stricken from the account upon the familiar ground that an agent employed to buy cannot become the seller.<sup>3</sup> So, in regard to the place where the securities are to be purchased, the Broker is justified in acting according to the course of trade and the regular usages of business.

Therefore, where a Client residing in Baltimore directs his Broker, residing in the same place, to purchase stock—the order being in general terms, and not directing the purchase to be made at any particular place or mode, and not containing any restrictions as to price—the Broker has the right to make the purchase in New York through correspondents' Brokers or sub-agents residing and doing business in that city.<sup>4</sup>

So, as to the length of time within which the Broker should execute his orders, the question depends upon the circumstances of each case. The general rule is, in the absence of express restrictions or limitations, that the authority of an agent continues until countermanded,<sup>5</sup> and that the principal may terminate the relation at any time.

<sup>1</sup> *Mar ye vs. Strouse*, 5 *Fed. Rep.* 483.

<sup>2</sup> *Id.*

<sup>3</sup> Nor is there any absolute engagement on the part of Broker to carry

out the order at all events (*Fletcher vs. Marshall*, 15 M. & W. 755).

<sup>4</sup> *Rosenstock vs. Tormey*, 32 Md. 169.

<sup>5</sup> *Birkett vs. Taylor*, N. Y. Ct. of App. MSS. Oct. 1881).



But the previous dealings between the parties, the usages of Brokers, the fluctuating and uncertain value of the securities dealt in on the Exchange, may all be appealed to to vary the general rules of law in this respect and establish a different principle.

In England it has been held that where an order has been given to a Broker to deal in a current security, a jury would be authorized to consider the usage of the Stock Exchange to deal for the coming settling-day, and to find that when that day arrived a reasonable time had elapsed for carrying out the order, and that the authority of the Broker was at an end.<sup>1</sup>

Until the Broker has acted upon his authority to buy shares, it may be revoked; and if any money has been given him, in order to enable him to pay for them, it may be demanded back.<sup>2</sup> But this cannot be done after he has entered into a contract for purchase and become personally responsible for the due performance of that contract.<sup>3</sup> But in both instances—viz., where he is directed to buy at a particular price, or at the market price—he is bound to act with diligence and prudence, and in entire good faith. A commission merchant or Broker has no right to conceal from his Client any portion of his transactions and dealings in relation to the property alleged to have been bought or sold; and when he withholds the fullest information on that subject, the right to examination before trial, in an action brought to recover alleged profits or to adjust the unsettled accounts, should be fully accorded.<sup>4</sup> And a Broker is also bound to exercise his judgment and discretion to the best advantage for the benefit of his principal, to render just and true accounts, and to keep

<sup>1</sup> *Maxted vs. Paine*, L. R. 4 Ex. 81; see also *Maxted vs. Morris*, 21 L. T. (n. s.) 535.      <sup>3</sup> *McEwen vs. Woods*, 11 Q. B. 13; *Sutton vs. Tatham*, 10 Ad. & E. 27.

<sup>2</sup> *Fletcher vs. Marshall*, *supra*.      <sup>4</sup> *Miller vs. Kent*, 10 N. Y. *Weekly Dig.* 362; s. c. 23 Hun (N.Y.), 657.

the property of his principal unmixed with his own or the property of other principals.<sup>1</sup>

In the case of *Miller vs. Kent*,<sup>2</sup> the court held that, in an action by a principal against a Broker for an account, the latter would be ordered to give an itemized account of all the transactions. A Broker who is the agent of his Client is, and ought to be, required to show fully and specifically each item of the account which he charges against his Client. Furnishing a gross sum is insufficient. Each of the parties to an account is entitled to know and to have presented to him, when a demand is made for a loss, supposed or real, the items which make up such loss, and to be given an opportunity not only to inspect and ascertain the correctness of the same, but to controvert such items whenever it becomes necessary.<sup>3</sup>

In order to charge a defendant in an action for money paid for the purchase of stock on his account, and by his order, the plaintiff must clearly show the authority under which he acted, and prove that he was instructed by the defendant to make the purchase. And where the proof is so defective that the jury will be compelled to infer such authority from conversations and admissions of the defendant, which are neither explicit nor satisfactory, the plaintiff will be non-suited.<sup>4</sup>

Speculations in stocks are frequently made by agents of the Client with the Broker. In such cases, where the authority of the agent is denied, the proof must be the same as would exist in an ordinary case between a third person seeking to charge the principal for the acts of his agent, and the burden would be upon the party asserting the fact. So cases may arise where a speculative transaction is made between a Client and a clerk or agent of the Stock-broker, and the authority of the clerk is disputed or his acts disowned by the Stock-

<sup>1</sup> *Gray vs. Haig*, 20 Beav. 219, 238.

<sup>2</sup> 23 Hun (N. Y.), 657.

<sup>3</sup> *Id.*

<sup>4</sup> *Ward vs. Van Duzer*, 2 Hall (N. Y.), 162.

broker, in which event ordinarily the question is one for a jury to determine. In a recent case in Nevada, it appeared that R. & P. were Stock-brokers, and R. was also agent and P. cashier of the express and banking business of W. F. & Co. One W. called at the banking department and asked R. how much interest W. F. & Co. would charge to buy for him certain shares of stock. The interest was agreed on, and R. & P. ordered the stock through their Brokers in San Francisco, and sent W. notice of the purchase in their own firm name of R. & P. The next day W., at R.'s request, executed his note to W. F. & Co. for the amount of money it took to purchase the stock. This note and another, executed in its place, were taken up, and replaced by the note sued on. The stock was never delivered to W., but the latter was credited upon the books of R. & P. with the stock and the amount of purchase-money stated in the note. R. & P. received credit with W. F. & Co. for the same amount as so much money deposited. R. & P. subsequently failed, and W. never received the stock. W. F. & Co. brought suit against W. on the note, and the question was whether the transaction was only a loan, as claimed by W. F. & Co., or a contract to procure the stock as claimed by W. The jury having found a verdict for W., the court upon appeal refused to disturb it.<sup>1</sup>

*(b.) Duty and Liability of Broker in Purchasing ; Right to Indemnity.*

In respect to the character and kind of stocks or securities which the Broker may buy, he is bound to purchase the kind designated by the Client. But if the Broker exercises prudence and care, he is not liable, although the securities purchased by him for a Client in the regular course of business prove spurious.

<sup>1</sup> Wells vs. Welter, 15 Nev. 276.

A Broker or factor is only required to act with reasonable diligence and care in his employment. The known usages of trade and business enter into such employment; and if he conducts his business according to such usages, he will be exonerated from all responsibility.<sup>1</sup>

In the case of *Westropp vs. Solomon*,<sup>2</sup> the plaintiffs were Stock-brokers, and were employed by the defendant to sell certain scrip which turned out to be invalid. The certificates were such as to deceive everybody who dealt in them. There was no fraud or negligence on either side. The Brokers paid the purchase-money back to the vendors, as also a certain sum which, under the rules of the Stock Exchange, had been prescribed to be paid in such cases. They then sued their principal, who did not contest the right of plaintiff to recover the principal sum, but defended as to the additional sum, as to which the defendant succeeded. In *Mitchell vs. Newhall*,<sup>3</sup> the defendant gave the plaintiff, a Broker on the Stock Exchange, an order to purchase for him fifty shares in a foreign railway company. At that time no *shares* of the company were in the market, the foreign government not having yet authorized its establishment; but *letters of allotment* for shares were then, according to the evidence of persons on the Stock Exchange, commonly bought and sold in the market as

<sup>1</sup> *Phillips vs. Moir*, 69 Ill. 155; *Gheen vs. Johnson*, 90 Pa. St. 38; *Sutton vs. Tatham*, 10 Ad. & E. 27; *Smith vs. Newhall*, 15 M. & W. 308; *Westropp vs. Solomon*, 8 C. B. 345; *Pollock vs. Stables*, 12 Q. B. 765; *Tempest vs. Kilner*, 3 C. B. 253; *Bayley vs. Wilkins*, 7 C. B. 886; *Hunt vs. Gunn*, 13 C. B. (n. s.) 227; *Taylor vs. Stray*, 2 C. B. (n. s.) 175; *Lamert vs. Heath*, 15 M. & W. 486; 15 L. J. Ex. 298; *Morrice vs. Hunter*, 14 L. T. 897; *Inclibald vs. Neilgherry Coffee Co.* 34 L. J. (C. P.) 15; *Peckham vs. Ketchum*, 5 Bosw. (N. Y.) 506; s. c. less fully, 10 Ab. Pr. (N. Y.) 220; *ton vs. Tatham*, 10 Ad. & E. 27; *Smith vs. Lindo*, 5 C. B. (n. s.) 587; *Rosewarne vs. Billing*, 15 C. B. (n. s.) 316; *Remfry vs. Butler*, 1 E. B. & E. 887; *Biederman vs. Stone*, L. R., 2 C. P. 504; *Chapman vs. Shepherd*, *Whitehead vs. Izod*, L. R. 2 C. P. 228; *Webb vs. Challoner*, 2 F. & F. 120; *McEwen vs. Woods*, 11 Q. B. 13; *Bayliffe vs. Butterworth*, 1 Ex. 425; see also, generally upon this subject, *Loeb vs. Hellman*, 83 N. Y. 601.

<sup>2</sup> 8 C. B. 346.

<sup>3</sup> 15 M. & W. 308.

shares. The plaintiff bought for the defendant a letter of allotment for fifty shares, and it was held, that a jury might well find that this was a good execution of the order.<sup>1</sup>

In *Lamert vs. Heath*,<sup>2</sup> where a Broker was instructed to purchase "Kentish Coast Railway Scrip," and he bought what was known as such and was paid for it, it was held that he was not liable to refund the money he had received; although it turned out that he had bought scrip issued without due authority, and, in fact, utterly worthless.

So in *Young vs. Cole*,<sup>3</sup> a Broker brought an action against his Client to recover the proceeds of Guatemala bonds which he had sold for his Client on the Exchange. The bonds, after being a short time in the purchaser's possession, were discovered to be unmarketable for want of stamps, and they were returned to the Broker, who indemnified the purchaser without consulting with his Client. The court held, upon the authority of *Child vs. Morley*,<sup>4</sup> that the Broker was entitled to recover from his Client the sum previously paid to him, on the ground that the consideration on which it had been paid over had failed, the Client having delivered something which, though resembling the article contracted to be sold, was of no value; and that the repayment made by the Broker to the purchaser was necessary, according to the custom of the Stock Exchange, which treated a Broker dealing with foreign stock as a principal, and made him liable to expulsion if he did not make good his differences.

In the case of *Peckham vs. Ketchum*,<sup>5</sup> a case almost similar to *Lamert vs. Heath*, the court held that a Broker who is employed to purchase stock, and who in good faith, and in accordance with the custom of the market, makes the purchase in his

<sup>1</sup> *Tempest vs. Kilner*, 3 C. B. 253;      <sup>3</sup> 3 Bing. (N. C.) 724.  
*Hunt vs. Gunn*, 13 C. B. (n. s.) 227.      <sup>4</sup> 8 T. R. 610.

<sup>2</sup> 15 M. & W. 486. See *Luffman vs.*      <sup>5</sup> 5 Bosw. (N. Y.) 506; s. c. less  
*Hoy*, 13 N. Y. *Weekly Dig.* 324.      fully, 10 Ab. Pr. (N. Y.) 220.

own name, and transfers the stock bought to his principal, is not liable to the principal if the stock prove to be spurious. In that case the plaintiff called at the office of defendants and ordered them to buy ten shares of railroad stock at a certain price. On the same day the defendants sent to the plaintiff a memorandum of the purchase, who sent his check for the same, the defendants stating that they would transfer the stock referred to into his name on the books of the company that day, but that the certificate would not be ready until the next day. At the time mentioned they delivered to him a certificate in due form for said stock, signed by one Schuyler, the transfer agent of said railroad company, who was the proper officer to issue the same. In the purchase of the stock the defendants acted in good faith "in the mode usual and customary among Stock-brokers in the city of New York, among whom it is not usual to disclose the names of their principals to persons with whom they dealt," and defendants paid for the stock upon receiving the certificate from the selling Broker. The certificate issued and delivered to the plaintiff did not represent actual stock, and was valueless; and, upon the discovery of this fact, in due time the plaintiff tendered the same to defendants and demanded a return of his money, which was refused, and the action was brought to recover the same. In an opinion giving judgment for the defendants, Hoffman, J., after reviewing the English authorities upon the subject, concluded that the plaintiff, having contracted with defendants as Stock-brokers, was bound by the custom which prevailed in relation to that species of business, and especially by the usage by which Brokers only, and not their Clients, are known in their dealings with each other, and that such a custom put the plaintiff in the same position as in the case of a contract made distinctly with one as the agent of a known or disclosed principal. The court also held that the employment of the defendants could not be

justly treated as an employment to purchase genuine stock to the extent and import of making them guarantors of the validity of that which they should purchase; *it was rather to purchase what in the market was passing as stock of this description, and that an agent employed to purchase a commodity of a particular character or quality is only bound to use all the circumspection and diligence which a prudent purchaser himself would exercise.*

The conclusion reached in this case is in accord with the English authorities, and is entirely sound upon principle, there being no just distinction in this respect between the employment of a Stock-broker and any other kind of agent.<sup>1</sup>

So where a person employing a Broker to sell shares directed him by mistake to sell 250, when he intended to sell and had only 50 shares, and the Broker sold the shares in accordance with his directions, the Client was held bound to pay the difference which, under the rules of the Stock Exchange, the Broker had been compelled to pay to the Broker to whom he had sold the same.<sup>2</sup>

And the case of *Morrice vs. Hunter*<sup>3</sup> furnishes still another illustration of the general rule. There the defendant instructed his Brokers to buy 10 *Agra & Masterman's* shares, which the Brokers' manager by mistake described as £25 shares in place of £50 shares with £25 paid, on which ground the defendant attempted to repudiate the transaction. In an action by the Brokers to recoup themselves for payments

<sup>1</sup> As to when the statutes against gaming cannot be set up in an action brought by a Broker to recover money paid at the request of his Client, see chapter on "Stock-jobbing," p. 420.

<sup>2</sup> *Sutton vs. Tatham*, 10 Ad. & E. 27; see also, to same effect, *Child vs. Morley*, 8 T. R. 610; *Lightfoot vs. Creed*, 8 Taunt. 268; s. c. 2 Moo. 255;

But see *Bowlby vs. Bell*, 3 C. B. 284; *Fletcher vs. Marshall*, 15 M. & W. 755; *Stewart vs. Cauty*, 8 M. & W. 160. As to liability of Broker for stocks lost by or stolen from him, or for losses occasioned in the exercise of his employment, see post, subdivision (c.), p. 138.

<sup>3</sup> 14 L. T. 897.

made on the Stock Exchange, Mr. Justice Willes left it to the jury to say whether the order given depended on there being £25 shares, or whether the plaintiffs had bought what they agreed to buy for the defendant.

The following case falls under the same general principle which we are considering: A savings-bank, having taken certain shares of stock to secure a loan, resolved that it should be sold by the president for the best interest of the bank. The president sold a part of the stock, and directed the plaintiff, a Stock-broker, to sell the remainder at a price named at the New York Stock Exchange; which he did, and so advised the president, whereupon the latter informed him that he had himself previously sold the stock. Plaintiff, being unable to deliver the stock to the Broker to whom he had sold it, was compelled to pay the purchaser differences. In an action against the receiver of the bank to recover the amount so paid—held, that the bank was liable to the plaintiff for the damage occasioned by the act of its president; and that the liability of the bank was not affected by the fact that it was forbidden by statute to loan money upon personal security.<sup>1</sup>

A somewhat different conclusion was reached *in re* London, Hamburg, and Continental Exchange Bank—Zulueta's Claim.<sup>2</sup> That case arose in the winding-up of a banking company. It appeared that the directors of the bank had given orders to their Broker to buy for the bank a large number of their own shares for the purpose of keeping up the price. Although the order was *ultra vires*, it was executed by the Broker in due course, some of the shares being taken and paid for by the directors and their friends, and the balance were transferred to a trustee for the company; and the Broker's account with the bank was credited with the price. The

<sup>1</sup> *Sistare vs. Best*, 16 Hun (N. Y.), 611.      <sup>2</sup> L. R. 9 Eq. 270.



question was whether the Broker was at liberty to prove for this amount in the winding-up of the company. Lord Romilly, the Master of the Rolls, held the proof should be admitted, on the ground that it was not the duty or business of the Broker to decide whether the directors were or were not exceeding their powers; and as the transaction was concluded, and the Broker's account with the bank credited with the price of the shares—which, in the opinion of the Master of the Rolls, was equivalent to the payment of money—the only remedy of the shareholders should be to require the directors personally to refund it. But this decision was reversed on appeal,<sup>1</sup> and the transaction held to be wholly void; and the Broker was held bound to know that the directors were acting *ultra vires*—the court intimating that even if the money had been actually paid over to the Broker by the directors, he would have been liable to refund it.<sup>2</sup> But where an application was made by Stock-brokers to be declared creditors of a company, and it appeared that the manager and certain directors, having associated themselves together in a body, called a “syndicate,” for dealing in shares of the company, employed the applicants to borrow money for them on the security of shares of the company, which the applicants effected by lending shares on several occasions to dealers on the Stock Exchange, who advanced the market value of the shares until a subsequent account-day. In the interim, a call was made on 820 shares thus lent by the claimants, which they paid; and the value of the shares falling, and their principals not giving them instructions to renew, the applicants at the end of the period sold the shares at a loss, and repaid the lenders of the cash. The balance of sums due the applicants on these accounts was the sum claimed. One of the “syndicate” was a

<sup>1</sup> S. c., rev'd, L. R. 5 Ct. App. 444.

<sup>2</sup> See also, in this connection, *Josephs vs. Pebrer*, 3 B. & C. 639.

brother of the applicant B; but the applicants deposed that they had no knowledge of the existence of this body, and believed throughout that they were dealing with property of the company by the direction of its authorized agents. It was objected that the claim was illegal, upon the ground that the applicants knew that these transactions were effected without the knowledge of the shareholders; and if not, the transactions were beside the company's powers: they must show that they held these shares as a security; and, if they did, that they have a right to be indemnified. But the vice-chancellor said the applicants had dealt with ostensible managers of the company in a regular way. If the articles had strictly forbidden the raising of money on behalf of the company by this means, there might have been a question as to whether the Brokers were not bound to take notice of such a provision; but, in fact, there was no such prohibition. No question as to the *bona fides* of the transaction could arise; for it seemed that these transactions were examined by the directors from day to day. The question resolved itself simply into one of indemnity, and the rule that it is the duty of principals to indemnify their agents must prevail. The mortgage might have been effected by some other means than by the loan of shares, and then no question as to the object to be repaid could have been raised. The claim was accordingly allowed.<sup>1</sup>

The language of Mr. Justice Blackburn in *Duncan vs. Hill*<sup>2</sup> is strong and apposite upon this question of the right of the Stock-broker to receive indemnity for acts performed in the business of his Clients. "It must be admitted that the plaintiffs were authorized by the defendants to enter into contracts

<sup>1</sup> In *re Imperial Mercantile Credit Assoc.* 2 Week. Notes (1867), 131. A bill lies by Stock-brokers to compel the defendant to accept the transfer of shares, bought for him, and to repay plaintiffs for calls in the shares (*Robins vs. Edwards*, id. 197). First Nat. Bank vs. Hoch, 20 Alb. L. J. 215; Pa. St. May, 1879.

<sup>2</sup> 8 L. R. Ex. 242, rev'g 6 L. R. Ex. 255.

in their behalf according to the rules of the Stock Exchange. It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect." And the case of *Marten vs. Gibbon*<sup>1</sup> carried the doctrine of indemnity still further; for in that case, where a Broker at the request of his Client made a sale on the Exchange to a jobber of the prospective dividends of shares in a railway company—dealings in which, by a rule of that body, will not be recognized—and the Broker subsequently paid differences to the jobber, it was held, notwithstanding the aforesaid rule, that the Client was bound to refund these differences to the Broker, on the ground that the rule did not affect the general liability of the members towards each other for contracts made on the Exchange. And a purchaser is bound to indemnify a Broker who pays for and takes a transfer of shares in a company after commencement of the winding-up.<sup>2</sup> And where a Client deposits bonds with a Broker to secure him against losses which might occur in speculations upon the Exchange, and it turns out that the bonds belong to the wife of the Client, and have been pledged by her husband without her consent, the Stock-broker can, in the absence of actual or constructive knowledge of the wife's interest in the bonds, hold them for the purposes for which they were placed with him. And the fact that the Broker receives checks during the existence of the transaction, drawn to the order of the wife and by her endorsed, is not sufficient to charge him with notice of the wife's interest in the bonds.<sup>3</sup>

<sup>1</sup> 33 L. T. (n. s.) 561.

*Emmerson's case*, L. R. 1 Ch. App.

<sup>2</sup> *Chapman vs. Shepherd*, L. R. 2

433.

C. P. 228; *Whitehead vs. Izod*, id.;

<sup>3</sup> *Macbryde vs. Eykyn* (1871), 6 Week. Notes, 111; *aff'd id.* 175.

A very interesting question arose in the case of *Mewburn vs. Eaton*<sup>1</sup> between a Broker and his Client. In that case the Broker had sold certain shares for his Client on the Stock Exchange, and the latter had executed the transfers and received the purchase price. Subsequently, however, the transfers were returned to the Broker by the ultimate purchaser for some trifling corrections in the spelling of names, and the Broker delivered the same to his Client for that purpose. The latter, however, refused to "initial" the corrections unless the Broker paid him the price mentioned in the transfers to the ultimate purchaser, which was higher than the price at which his shares were originally sold. In consequence, the shares were bought in, and the Broker, under the rules of the Stock Exchange, was compelled to pay the differences to the jobber. And the court held that the Broker was entitled to recover the sum which he had so paid out by reason of the conduct of the Client. The court did not pass upon the question as to whether a vendor was bound to sign a transfer to the ultimate purchaser in which the consideration was stated at a price greater than that which he had received for the shares; but the intimations were that he would not be so compelled. It was held that this objection had been waived by the Client in originally signing the transfers.<sup>2</sup>

A principal in a stock transaction cannot avoid his liability to his Brokers for a loss by setting up the guaranty of a third party. In *Lee vs. Gargulio*,<sup>3</sup> the plaintiff, it appeared, had certain stock transactions in which defendants acted as his Brokers, in which there was a loss. He sought to avoid this loss by introducing a guaranty signed by one F., which was en-

<sup>1</sup> 20 L. T. Rep. (n. s.) 449.

<sup>2</sup> In *Hawkins vs. Maltby* (L. R. 6 Eq. 505; 4 Ch. App. 200), the specific performance of a contract was refused, on the technical ground that the bill called for the enforcement of

a contract for a different consideration than that actually agreed upon. But subsequently the Broker was held entitled to an indemnity.

<sup>3</sup> 45 N. Y. Sup. Ct. (13 J. & S.) 595.

closed in a letter to defendants. The letter began, "Yours, notifying me of acceptance of my offer by customer at 35, at hand. I accept his conditions as set forth in your letter, and enclose guaranty, etc." The guaranty enclosed was in these words: "For and in consideration of one half the profit on 800 shares, etc., I hereby guarantee the holder of said 800 shares against all or any loss whatsoever; and further agree, in case of decline of said stock below 35, to deposit margin, if called on to do so, to cover all or any decline as fast as it may be made in said stock. Orders to sell and repurchase said 800 shares, or any part thereof, to be given exclusively by me, the undersigned, for a period of sixty days from the date hereof." Held, that by accepting the guaranty the Broker did not discharge the principal, and that it was not inconsistent with the original agreement.

But in an action against a surety who has agreed in writing to indemnify a Stock-broker against losses in any stock speculations which the Broker might make for his Client, the accounts rendered to the latter by the Broker, which showed a loss, and were admitted to be correct by the Client, are not admissible against the surety. In such a case, the party holding the indemnity claiming loss against his indemnitor must prove it by evidence competent against him. He cannot prove it by the mere admissions or statements of the principal, however formally made. The admissions of the Client are no part of the *res gestæ* so as to be binding upon the surety.<sup>1</sup>

From all the cases heretofore cited upon this subject, the rule to be deduced is, that where a Broker acts in pursuance of his authority, according to the usages of the Stock Exchange or of his fellow-Brokers, and in good faith and with prudence, he is entitled to a full indemnification for any losses which may occur in the transaction of the business.

<sup>1</sup> Hatch vs. Elkins, 65 N. Y. 489.

But the Broker has no right to recover where he acts beyond the scope of his authority.<sup>1</sup> This proposition is well illustrated in the case of *Bowlby vs. Bell*.<sup>2</sup> In that case a Broker was employed to sell shares, and made a bargain on the Stock Exchange for the purpose. The scrip having been sent to the company's office for registration, the Broker failed to deliver registered shares, and, after notice from his Client not to do so, paid the difference due on a "buying in" of other shares at an advanced price against him. He claimed to recoup the same as money paid to the Client's use. The price of the shares had not been paid to the latter, and no transfer had been tendered by the purchaser; and the court was of the opinion that, as the Broker of the purchaser had made no such tender, he was not in a position to take any steps against the Broker of the vendor; and, therefore, the difference paid by the latter was paid in his own wrong, and could not be recovered from his principal. In this case it appeared that the contract made by the selling Broker was for the sale of registered shares. Upon this point the court said: "If the contract was for unregistered shares, it may be collected from the correspondence that the defendant did not authorize the plaintiff to make such a contract; and if he did make it, and thereby increased a liability to have shares bought in against him, he cannot charge the defendant with the loss sustained."

A similar result was reached in *Fletcher vs. Marshall*,<sup>3</sup> where the plaintiff employed the defendants as Brokers to buy shares for him to be delivered within a "reasonable time;" and the defendants made a bargain for the next settling-day with H., who did not then deliver, yet they paid the purchase-money;

<sup>1</sup> See cases heretofore cited under this head.

<sup>2</sup> 3 C. B. 284, decided on the authority of *Stephens vs. De Medina*, 4 Q. B. 422.

<sup>3</sup> 15 M. & W. 755; consult also, in this connection, *Stewart vs. Cauty*, 8 M. & W. 160.

and it was held by the Court of Exchequer that the words "reasonable time" were rightly interpreted by the usages of the Stock Exchange, and that on non-delivery of the shares on the settling-day the defendants ought not to have paid the money, and that an action would lie against them by the plaintiff to recover it.

Nor can a Stock-broker bind his Client by anything done under a rule of the Exchange which was not made until after the instructions were given to him.<sup>1</sup>

So in the case of *Clegg vs. Townshend*<sup>2</sup> it was decided that a Broker must not incur any expense on the principal's behalf which the Broker can avoid. Accordingly, where—acting on the supposed instructions of his principal, who wished to repudiate a contract for the purchase of shares—a Broker defended an action which was virtually without legal merit, and sued his principal for the price of the shares and costs of the former action, the price having been paid into court, the trial-judge directed a non-suit.

And the court, in the case of *Hoffman vs. Livingston*,<sup>3</sup> carried the general principle so far as to hold that the Broker could not recover his commissions, where it is shown that he has not exercised due diligence and ordinary skill in the management of his Client's business—i. e., not giving her notice of each transaction in stocks according to the usages of Brokers.<sup>4</sup>

So where the defendants, acting as plaintiff's Brokers, purchased for him \$40,000 in gold, he entered into two agreements with one M., by one of which he sold \$20,000 to be delivered at his option between the 1st and 20th of February; and by the other he sold \$20,000, to be delivered at M.'s op-

<sup>1</sup> *Westropp vs. Solomon*, 8 C. B. 345.

<sup>2</sup> 46 N. Y. Sup. Ct. (14 J. & S.) 552.

<sup>3</sup> See also post, sub. "Commissions," pp. 233, 234.

<sup>4</sup> 16 L. T. 180.

tion between the 21st of January and 21st of February. The contracts signed by M. were sent by the plaintiff to the defendants, with a letter requesting them to deliver the amounts to the buyer. An agent of M. called on the 30th of January, and demanded the \$20,000 deliverable at his option, which was accordingly delivered to him. The agent at the time stated that he had the other contract in his possession. The defendants did not tender the \$20,000 sold under the other agreement during the time specified. In an action brought to recover the damages sustained by the loss of the opportunity to sell the gold, held, that it was the defendants' duty to have made the tender, and they were liable to the plaintiff for the damages sustained by him from their failure so to do. The plaintiff was first informed of their failure on the 3d of April. Held, that it was his duty to take at once the necessary steps to secure himself against further loss, and that the defendants were not responsible for any loss sustained by him in consequence of the subsequent fall in gold.<sup>1</sup>

And a Broker employed to sell shares, who renders a sales note to the purchaser or his agent, in his own name, is liable as a principal, although known to be a Broker. Evidence that it is the custom in the place where the transaction is made to send in Broker's notes without disclosing the principal's name is properly rejected; and the subsequent rendering of a different note describing the true purchaser will not alter this rule.<sup>2</sup>

(c.) *Disposition of Stock when Purchased; Safely Keeping same; Liability to Keep Identical Stock Purchased, etc.*

After the stock has been purchased and paid for by the Broker, several questions arise respecting the care and disposition

<sup>1</sup> Speyer vs. Colgate, 4 Hun (N. Y.), 622.

<sup>2</sup> Magee vs. Atkinson, 2 M. & W. 440.



thereof. The first question arises as to the transfer of the stock.<sup>1</sup> It has been held that the Broker is entitled to have the stock transferred into his own name, or those of his clerks, so that he may be able to secure himself for the amount of the advances made by him. In *Horton vs. Morgan*,<sup>2</sup> the court said: "As he [the Broker] was to hold the shares as security for the balance of the purchase-money, which he had advanced, it was proper and entirely consistent with the nature of the transaction that he should take the title in his own name; . . . and we do not see anything unlawful in his transferring it to his clerks if it remained under his control, and if he was ready when called on by the plaintiff to transfer it to him upon the advance being paid."<sup>3</sup> And when the Client directs the Broker to deliver the stock to him, giving him the full price therefor, the Broker is not bound to procure a transfer of the stock for the principal, where the office of the company is removed from the city where the Broker lives and the company is insolvent.<sup>4</sup>

But this right of the Broker to have stock transferred in his own name does not, it would seem, deprive the Client of the privilege to vote upon the stock. The rule is well settled that pledgors of stock are entitled to vote upon it.<sup>5</sup> And although there seems to be no express decision upon the subject, it is reasonable to argue that the law would compel the

<sup>1</sup> As to liability for "calls" or "assessments" upon stocks, see post, p. 151.

<sup>2</sup> 19 N. Y. 170.

<sup>3</sup> To same effect, *Genin vs. Isaacson*, 6 N. Y. *Legal Obs.* 213-216; see also *Nourse vs. Prime*, 4 Johns. Ch. 490; s. c. 7 id. 69. The same rule exists in the case of a pledge, the law being that the pledgee may transfer the securities into his own name (*Schouler on Bailm.* 182, 200; *Tyler on Usury*, 507).

<sup>4</sup> *Horton vs. Morgan*, 19 N. Y. 170.

As to duty of selling Broker to procure registration or transfer of stock on books of company, see *Stray vs. Russell*, 1 El. & E. 888; *Taylor vs. Stray*, 2 C. B. (n. s.) 175, aff'd id. 197; *Humble vs. Langston*, 7 M. & W. 200.

<sup>5</sup> *Strong vs. Smith*, 15 Hun (N. Y.), 222; *Ex parte Willcocks*, 7 Cow. 402; *Matter of Barker*, 6 Wend. 509; *Schouler on Bailm.* 200; *McDaniel vs. Flower Brook Manuf. Co.* 22 Vt. 274; *Edwards on Bailm.* § 219; *Merchants' Bank vs. Cook*, 4 Pick. 405.

Stock-broker to retransfer the stock into the name of his Client, or to give him a proxy where that method would suffice, to enable him to exercise this important attribute of ownership.<sup>1</sup>

With respect to the care which the Broker should exercise in keeping the securities of his Clients, it seems to be settled

<sup>1</sup> Since the above was written, Mr. Justice Barrett, in the Supreme Court, N. Y. City, has rendered a decision which bears generally upon and sustains the view of the text. In that case, one McH. brought an action against J. and others as trustees to restrain them from voting upon shares of the C. C. C. and I. Railroad at a future election. These shares of stock were purchased by McH. in 1873, by direction of W., then president of the Erie Railway Company, for the purpose of enabling the company to obtain a controlling direction of the C. C. C. and I. road. This stock was involved in a suit brought by the Erie Railway Company against McH. in England, and McH. claimed that as the result of a judgment against him in that suit, this stock belonged to him on making certain payments, which he alleged he was prepared to do. It was claimed on behalf of the defendants that the stock referred to was pledged by McH. for a loan in 1874; that they were sold in 1876 to the New York, Lake Erie, and Western Railroad Company, and that J. holds them as trustee for that company, subject to McH.'s right of redemption by payment of the loan and subsequent attachments put upon the stock by the company. McH., it was asserted, is insolvent, and cannot pay these claims; and it was averred that J. had voted upon this stock since 1876 without objection on the part of McH. Judge Barrett, in his decision, says: "The

cases cited have no bearing, for the proposition is not disputed, that the company can only look to its transfer-book in determining who is entitled to vote. It is just because the defendant is registered as the owner of the stock, and entitled upon the face of the company's books to vote, that this action is brought. There is really no answer to the gist of the plaintiff's bill, which is that he is the owner of the shares, and that the defendant holds them as collateral merely; facts established in an English court of justice upon the defendant's own contention. It will hardly be contended that a pledgee has a right, without special contract to that effect, to vote upon collaterals against the wish of the pledgor. This is substantially this case, for there is no pretence of a direct contract upon the subject of voting. And whatever license the defendant may previously have had is plainly revokable. The defendant says that unless he is permitted to disregard the plaintiff's wishes to vote upon the shares, the latter will be voiceless at the election. The owner is surely the only person to complain of such a state of things. The plaintiff's rights in the present particular are also unaffected by the attachment proceedings. Upon the whole, it seems to me to be entirely clear that the injunction should be continued *pendente lite*" (N. Y. *Daily Reg.* Oct. 11, 1881). As to right to vote by proxy, see Ch. IX.

that if the securities be stolen from or lost by the Broker he is not liable unless the theft or loss arose from or was connected with a want of ordinary diligence or care on his part.<sup>1</sup>

In the case of *Abbett vs. Frederick*<sup>2</sup> it was held that a pawnbroker, where his place of business was broken into and articles pledged taken therefrom, was not liable if he exercised ordinary diligence. The court said: "The rule laid down in the case of *Arent vs. Squires*,<sup>3</sup> that in cases of pawn or pledge all that has ever been required since the days of Bracton, by the common-law, on the part of the pawnee, has been that which is required of warehousemen, the exercise of ordinary diligence, is the law which must govern this case." So where a bank receives stocks or bonds as collateral security for the repayment of a loan, it is not liable for their loss unless there has been an absence of proper and sufficient care on its part, and this is a question for the jury.<sup>4</sup>

Lord Holt quotes Bracton to the effect that, if a creditor takes a pawn, he is bound to restore it upon payment of the debt; but if the pledge be lost while in the possession of the pledgee, and the latter has used due diligence, he will be indemnified notwithstanding the loss, and he may resort to the pledgor for the debt.<sup>5</sup> But in the case of *Cutting vs. Marlor*<sup>6</sup> it was held that a corporation is liable for stocks and bonds

<sup>1</sup> 2 Pars. on Cont. (6th ed.) 112; 1 Inst. 89 a; 4 Rep. 83 b; *Abbett vs. Frederick*, 56 How. (N. Y.) Pr. 68; *Third Natl. Bank vs. Boyd*, 44 Md. 47; *Jenkins vs. Natl. Village Bank*, 58 Me. 275; *Dearborn vs. Union Natl. Bank*, 58 id. 273; 61 id. 369.

<sup>2</sup> *Supra*.

<sup>3</sup> 1 Daly, 347.

<sup>4</sup> *Third Natl. Bank vs. Boyd*, *supra*.

<sup>5</sup> *Bracton*, 99 b; see also *Schouler on Bailm.* 190 et seq.; *Third Natl. Bank vs. Boyd*, *supra*. The liability of trustees does not extend to cases of robbery or fraud beyond the care

which a prudent man would take of his own property (*Morley vs. Morley*, 2 Ch. Cas. 2; *Jones vs. Lewis*, 2 Ves. Sen. 240; *Exp. Belchier*, Amb. 218; and see *Bostock vs. Floyer*, L. R. 1 Eq. 26). As to precautions which trustees of shares payable to bearer should take with regard to the safety of securities transferable by delivery, and as to shares which a company requires to be registered in a single name, *Consterdine vs. Consterdine*, 31 Beav. 330.

<sup>6</sup> 8 N. Y. *Weekly Dig.* 345; aff'd 78 N. Y. 454.

deposited with it as collateral security for a loan which have been abstracted and misappropriated by one of its officers who was permitted to have unrestrained control of the affairs and assets of the corporation, and where the trustees omitted to exercise a proper oversight over the conduct of such officer. And this case is equally applicable to Stock-brokers who receive stocks of their Clients as collateral or otherwise, and, through fraud or negligence, allow them to be lost or misappropriated. This principle has also been extended to a case where a firm, in the course of its business, received money belonging to third persons, and one of the partners misapplied it while it was in the custody of the firm; and it was held that the latter must make it good.<sup>1</sup>

And the cases just cited directly hold that where stocks or money are received or held by a firm of Stock-brokers for its Clients, and an individual member converts or misapplies the same, the remaining partners are liable to the Clients, although they had no knowledge of the conversion or misapplication.

In a recent case in Pennsylvania<sup>2</sup> the question was discussed as to the liability of a Stock-broker for margins which he had placed in the hands of a fellow-Broker to cover transactions of his Client. The court laid down the rule that where the Broker acted in good faith, and in accordance with the usages of Stock-brokers, he was not liable for the loss of the margins caused by the insolvency of his fellow-Broker. The court said: "The law implies a promise from Brokers, bankers, or other agents that they will severally exercise competent skill and proper care in the service they undertake to perform; but it neither implies nor requires more than this." Ac-

<sup>1</sup> 1 Lindley on Part. (4th ed.) 304, Marsh, 6 B. & C. 551; and Ry. & and cases cited; Devaynes vs. Noble Moo. 364; see also, in this connection, Butler vs. Finck, 21 Hun (N. Y.), vs. Lee, 6 Beav. 324; De Ribeyre vs. 210.  
Barclay, 23 Beav. 107; Stone vs. <sup>2</sup> Gheen vs. Johnson, 90 Pa. St. 38.

cordingly, where G., a Stock-broker, deposited a margin with B., another Broker, to cover a short sale made by G. on account of one J., and did not demand security therefor, but, according to the custom of Brokers, it was optional with G. to do so, he acting in good faith; and when the deposit was made with B., the latter was in full credit—held, that there was no evidence of negligence such as would make G. responsible for a loss occurring through B.'s insolvency.<sup>1</sup>

Another important question should be alluded to in this connection—viz., as to the use which the Broker may make of securities held by him on margin.

Although in law these securities are regarded as the Client's, the Broker's money has paid for them. Can the latter, therefore, use the same in his business? Can he hypothecate them? Both reason and the precedents hereinafter alluded to seem to require these questions to be answered affirmatively. In the case of an ordinary pledge of personal property, the general rule seems to be, that the pledgee has the right to use the pledged property, unless prohibited either by the nature of the thing pledged or by agreement,<sup>2</sup> the pledgee accounting to the pledgor for the benefits or profits less the amount properly expended in the use of the thing.<sup>3</sup>

The authorities, however, do not all accord upon this subject; but whatever doubt there may be in relation to other kinds of personal property, it seems to be clear that, in case of stock purchased on margin by a Stock-broker, the latter would have the right to use it in his business. And this follows from the peculiar nature of stock, and from the circumstances attending an ordinary speculative transaction in the same.

In the first place, a Stock-broker, when he makes a purchase

<sup>1</sup> Wykoff vs. Irvine, 6 Minn. 496;  
Sudler vs. Lee, De Ribeyre vs. Baulay.

<sup>2</sup> Schouler on Bailm. 196 et seq.  
<sup>3</sup> Id.

of stocks on the order of his Client, receives the same directly from the selling Brokers in the shape of a certificate with a blank assignment and irrevocable power of attorney authorizing its transfer on the books of the particular company, and the stock generally does not pass through the hands of the Client at all. By advancing the purchase-money for the stocks, the law gives the Broker a lien for the same, and establishes the relation of pledgor and pledgee.

In the second place, the money which the Broker advances is a part of his capital, upon which he relies to carry on his business; accordingly, he is compelled to use the stocks of his Client to borrow money upon, which he does from banks or capitalists, and he is thus enabled to get back the whole or some part of the money originally invested, with which he continues to transact his business. If it were held that the Broker was bound to keep on hand the identical stock purchased for a Client, and that he could make no other use or disposition of the same, it is apparent that his business would be stopped, for no private fortune would be adequate to make many purchases.<sup>1</sup>

None of the questions which arise out of a pledge of ordinary personal property, capable of being handled and of manual delivery, can apply to a pledge of stock. The latter cannot be handled or worn or used; it is nothing but an incorporeal right, and the certificate merely represents the interest which the owner has in the whole capital—the right to share in the profits and property when they are divided.

Nor is this question affected by the rule applied in the case of *Langton vs. Waite*,<sup>2</sup> where the plaintiff borrowed from the defendants, who were Stock-brokers, a certain sum of money, and deposited with them certain railway stock, which the defendants subsequently sold, and, repurchasing the same at a

<sup>1</sup> See *Price vs. Gover*, 40 Md. 115.

<sup>2</sup> 6 L. R. Eq. 165.

lower price, delivered the latter stock to the plaintiff upon the payment of his loan.

In that case it did not appear that the defendants kept on hand a sufficient or any quantity of stock of the kind deposited with them by the plaintiff; and the court, in accordance with the rule laid down in the American cases hereafter referred to,<sup>1</sup> charged the defendants with the price at which they sold the same.

Accordingly, the doctrine may be asserted as well settled, that a Broker holding stocks for his Client on margin for speculation is not bound to keep on hand the identical shares purchased; but he answers all of the duties of his employment, by having ready for delivery to his Client shares of the same description and amount. Shares of stock have no earmark; and one share being of equal value with every other share of the same stock, the Brokers are not bound to deliver, or to have on hand for delivery, any particular shares, or the identical shares purchased, for a Client.

This principle was first laid down in the State of New York in the year 1820 by Chancellor Kent, in the well-known case of *Nourse vs. Prime*.<sup>2</sup> In that case the defendants, who were Stock-brokers, had purchased various shares of United States Bank stock for the plaintiff, and rendered him an account thereof, by which it appeared, that the latter was indebted to defendants in a large sum of money, for which he gave his promissory note, the defendants retaining the shares as collateral security, and giving therefor to the plaintiff the following receipt: "We acknowledge to hold 430 shares of the stock of the United States Bank as collateral security for the payment of the said note, dated the 24th of December last, for \$54,200, payable on the 10th of January next, with interest at 7 per cent., etc.; on the payment of which note and interest we

<sup>1</sup> Post, p. 147.

<sup>2</sup> 4 Johns. Ch. 490, and 7 id. 69.

engage to retransfer the said 430 shares to the said C. J. N. or his order, accounting with him for the dividends that shall become payable on the same; and in case the note and interest are not duly paid, we are at liberty to make an immediate sale of the said shares, accounting with him for any surplus, and holding him responsible for any deficiency. Dated New York, 11th Feb., 1818." Upon a bill in Chancery to restrain the defendants from proceeding with a suit at common-law on the note, and to compel defendants to account to the plaintiff for the highest market price at which the defendants had sold any United States Bank stock immediately, the Chancellor held—treating the question as an original one, to be decided upon general principles—that, as the plaintiff dealt with the defendants in their character as Stock-brokers, and the shares in question were not defined and designated so as to be distinguishable from other shares in the same bank, under the receipt in question the defendants had performed their whole duty in the premises by having on hand or under their control shares to the amount in question, which they were ready, able, and willing to account to the plaintiff for; and that, in the absence of express stipulation, they were not bound to hold the identical shares purchased for plaintiff or referred to in the receipt. This case again came before the court upon the pleadings and proof, the former opinion having been delivered by the Chancellor in dissolving an injunction, and the opinion previously given was fully endorsed; and it was expressly decided that, considering the established usage of Brokers in similar cases, there was an implied authority from the plaintiff to the defendants to sell or pledge the stock to raise money to meet their advances in respect to the transaction with the plaintiff, and that the plaintiff only reserved to himself a right to call for a retransfer to him of a similar number of shares on payment of his note.



The case of *Nourse vs. Prime* was cited by the Supreme Court of Pennsylvania, in the year 1846, in *Gilpin vs. Howell*,<sup>1</sup> and the principle there laid down fully confirmed. Again, in 1859, the New York Court of Appeals, in *Horton vs. Morgan*,<sup>2</sup> said: "The plaintiff had no interest in having his shares kept separate from the mass of the defendant's stock. One share was precisely equal in value to every other share."<sup>3</sup>

The same doctrine was laid down in England early in the reign of George the First (1722) by the Court of Chancery, in the case of *Le Croy vs. Eastman*.<sup>4</sup> In that case, plaintiff bought £990 of South Sea stock of one Le G.; but, not caring to have this stock in his own name, it was, at his desire, transferred to the defendant, from whom the plaintiff took a note, declaring that he was a trustee of this stock for the plaintiff, and that he would be accountable to him for the stock and produce. Afterwards, when the stock sold at about 600 per cent., the plaintiff desired that the defendant would transfer the £990 of stock to him; the defendant accordingly transferred £500 of this stock, and informed the plaintiff that it would be inconvenient to him, at that time, to transfer more, but that it was all one, for he would be accountable for

<sup>1</sup> 5 Pa. St. 41.

<sup>2</sup> 19 N. Y. 170.

<sup>3</sup> See also, confirming the above proposition, *Genin vs. Isaacson*, 6 N. Y. *Legal Obs.* 213; *Salter vs. Genin*, 7 Ab. Pr. (N. Y.) 193; s. c. 3 Bosw. 250; *Stewart vs. Drake*, 46 N. Y. 449; *Levy vs. Loeb* (not yet reported, N. Y. Ct. of Appeals, Oct. 1881), applying the rule to government bonds; *Lawrence vs. Maxwell*, 58 Barb. 511, 6 Lans. 469, 53 N. Y. 19; *Taussig vs. Hart*, 58 N. Y. 425; *Rogers vs. Gould*, 6 Hun (N. Y.), 229; *Thompson vs. Toland*, 48 Cal. 100; *Marston vs. Gould*, 69 N. Y. 220, at p. 226; *Chamberlin vs. Greenleaf*, 4 Ab. New Cas. (N. Y.) 178; *Capron vs. Thompson*,

N. Y. Ct. App. 13 N. Y. *Weekly Dig.* 199; *Boylan vs. Hugnet*, 8 Nev. 345; see also *Wynkoop vs. Seal*, 64 Pa. St. 361; *Wood vs. Hayes*, 81 Mass. 375; *Atkins vs. Gamble*, 42 Cal. 86; *Hawley vs. Brumagim*, 33 Cal. 394; *Le Croy vs. Eastman*, 10 Mod. 499; *Mocatta vs. Bell*, 27 L. J. Ch. 237; *Berlin vs. Eddy*, 33 Mo. 426; *Price vs. Gover*, 40 Md. 102; *Worthington vs. Tormey*, 34 Md. 193. See also, upon this head, *Clarke vs. Meigs*, 13 Ab. Pr. (N. Y.) 467; 22 How. Pr. (N. Y.) 340, rev'g 12 Ab. Pr. 267, and 21 How. Pr. 187. Also *Taylor vs. Ketchum*, 5 Robertson (N. Y.), 507; s. c. 35 How. Pr. (N. Y.) 289, overruled by the above cases.

<sup>4</sup> 10 Mod. 499.

the stock. Subsequently the stock fell, and the plaintiff brought a bill against the defendant, praying, that he might account for the £490 stock at the price the stock was at the time he requested defendant to deliver the same — viz., at £600, insisting that the defendant, by agreeing to be accountable, had assumed to pay at the price it then was. There was no question of conversion in the case. The defendant had, for some time after he became trustee as above, £1000 of the stock, which he had mortgaged, and he afterwards sold all the stock he had in his own name, except £80; but he had more than stock enough in another person's name to have answered the trust, if the plaintiff had insisted upon a transfer, and he offered to transfer the £490 stock and produce. Parker, Lord Chancellor, held that it was not material at what the defendant sold the stock, for the sale was at his own risk. If the stock had risen, he would still have been accountable for the same; and, therefore, as he must have stood to the loss in case of the rise, it was reasonable that he should reap the advantage of a fall.

The Lord Chancellor said: "I take it to be very plain that the defendant has not sold, but mortgaged, the trust stock. *For since there is no specifying £100 South Sea stock from another, . . .* therefore the stock mortgaged must be esteemed the stock of the plaintiff, the stock sold that of the defendant. The defendant must only account for the stock and produce."

The same rule applies where government bonds are purchased for a Client; and in such case the identical bonds need not be retained, unless there be some special agreement to the contrary.<sup>1</sup>

So it is within the scope of the implied authority of a member of a Stock Exchange, when securities are deposited with him for the purpose of his advancing money upon

<sup>1</sup> Levy vs. Loeb (N. Y. Court of Appeals, Oct. 1881, not yet reported).

them, to pledge those securities to some other person for that purpose.<sup>1</sup> But, where a Client delivers a specified quantity of stock to a Stock-broker for sale, and the Broker transfers part of the same to a third person, and part to himself, the Client can treat this as a sale of his stock; and it is no defence, that it is a custom among Brokers to place the stock sent them for sale to their own names on the books of the company, and, in making transfers, to do so indiscriminately, without regard to the person from whom the stock was received, or for whose account the same was sold. A Broker, in such a case, has no right to pledge or do anything else with the stock except to sell it.<sup>2</sup>

And the Broker must at all times have on hand stock sufficient in quantity to deliver the same to his Client upon the payment by the latter of the amount due thereon. The most he can claim is that, so long as he has on hand shares similar in kind, etc., to those he has purchased for his Client, he has performed his contract; but when he denudes himself of the quantity sufficient to answer his Client's demands, he is guilty of a conversion, and the latter may assume that the sale by which the Broker dispossessed himself of the stock was made for his benefit, and recover the price of the shares on the day the sale was made.<sup>3</sup>

The language of the New York Court of Appeals, in the case of *Taussig vs. Hart*,<sup>4</sup> is interesting upon this question: "The subsequent acquisition, by the plaintiffs after the stock had fallen to a very low figure, of a sufficient number of shares to replace those which they had held for account of the defendant, did not relieve them from liability. Such re-acquired stock was never accepted by the defendant, and he

<sup>1</sup> *Mocatta vs. Bell*, 27 L. J. Ch. 237.

<sup>2</sup> *Parsons vs. Martin*, 77 Mass. 111.

<sup>3</sup> See, as to this point, *Langton vs. Waite*, 6 L. R. Eq. 165.

<sup>4</sup> 58 N. Y. 425.

was, in fact, ignorant of the transactions. To allow a Broker to sell his customer's stock without authority, and speculate upon it, replacing it at a lower price, would be encouraging speculations by agents at the risk of their principals, and is totally inadmissible under familiar rules. Should the stock rise largely in price, after the Broker had thus divested himself of all control over the shares which he had purchased on the order of his principal, the Broker might be unable to replace the shares, and the principal would have no remedy except a personal claim against the Broker. This, clearly, is not what is contemplated under an agreement to buy and carry stocks. The customer does not rely upon an engagement of the Broker to procure and furnish the shares when required, but upon his actually purchasing and holding the number of shares ordered, subject only to the payment of the purchase price."<sup>1</sup>

So it has been held in England that where money was borrowed from a Stock-broker for a certain period, and railway stocks deposited with him as collateral for its repayment, the Stock-broker was not justified, either in law or by the custom of the Stock Exchange, in parting with the security during the pendency of the loan, but was bound to return the identical stock pledged; and that the person to whom the loan was made was entitled to recover from the Broker the amount of profits realized by the dealings in his stocks by the latter.<sup>2</sup> The court said that, "in the absence of express contract, the

<sup>1</sup> To same effect, *Lawrence vs. Maxwell*, 53 N. Y. 19. See, as to right of pledgee to part with stock, under a written instrument conferring general authority to use, etc., *Ogden vs. Lathrop*, 65 N. Y. 158. See also, in same connection, *Dyk-ers vs. Allen*, 3 Hill (N. Y.), 593, 500. *Fay vs. Gray*, 124 Mass. 500. <sup>2</sup> *Langton vs. Waite*, L. R. 6 Eq. 165. But parol evidence in the case of a

pawnee of property cannot sell it until the debt for which it is pledged becomes payable; and if he does so, the owner has a right to charge the pawnee with the price he gets for the property if he finds it to his interest to do so." The court also; while finding that there was, in fact, no custom of the Stock Exchange which varied the rule above laid down, declared that such a custom would be manifestly unjust; the borrower would be completely at the mercy of the lender, who might convert the security and appropriate the proceeds to his own use, and at the expiration of the period of the loan be wholly unable to return to the borrower what belonged to him.<sup>1</sup>

But the owner of stocks pledged as collateral for the repayment of borrowed money may deprive himself of any remedy by dealing with the property so retransferred to him.<sup>2</sup>

Where plaintiffs, Stock-brokers holding stocks for different Clients on margin, in speculative transactions, pledge the same to outside Brokers, who in turn repledge or rehypothecate the stocks with a bank, and subsequently the latter claims to appropriate and hold them as security for other distinct loans made to the outside Brokers, and in consequence thereof the plaintiffs are compelled, under duress, to pay an excessive amount to release the stocks, the plaintiffs have the right to maintain an action against the bank to recover such excessive sum. The stocks being the property of the Clients and having been released, the extra sum paid to obtain the custody of the same being the money of the plaintiffs, the latter have the exclusive right to recover the same.<sup>3</sup>

And there would seem to be no good reason in law, why a

<sup>1</sup> See also *Ex parte Phillips*, *Ex parte Maruham*, 30 L. J. Bk. 1; 2 De G. F. & J. 634; *Phené vs. Gillan*, 5 Hare, 1; 1 Story's Eq. Jur. 714, note 1.

<sup>2</sup> See *Langton vs. Waite*, L. R. 4 Ch. App. 402.

<sup>3</sup> *Gould vs. Farmer's Loan and Trust Co.* 23 Hun, 322, at p. 326. See also p. 160 et seq.

Broker holding stocks on margin, in a speculative transaction, should not have the right—he possessing the power to dispose of the securities—to maintain an action for their recovery against any person wrongfully holding the same, notwithstanding the technical ownership of them is in his Clients.

But the rule that the Broker is not bound to keep on hand the identical stock or bonds purchased only applies in the absence of agreement. Where the parties agree that the original bonds shall be carried, the Broker must keep them on hand in the identical shape in which they were purchased. And where the Broker sells or disposes of the bonds in breach of such an agreement, he cannot recover from his Clients any loss arising upon a sale of other bonds substituted for the original, although the Broker shows that he had constantly on hand during the relation other bonds sufficient to meet the demands of his Clients.<sup>1</sup> Before a Broker can recover in such a case, he must show that he has performed substantially all the conditions precedent which are embraced in the contract.<sup>2</sup>

These questions arose very recently in the case of *Levy vs. Loeb*.<sup>3</sup> There the defendants, bankers and Brokers, bought for account of the plaintiff certain bonds of the United States upon an agreement that the defendants were to advance the purchase price in the form of a loan, upon which interest at the rate of 4 per cent. was to be allowed; the bonds meanwhile being held as collateral to the loan, but to be carried by the defendants, for plaintiff's account. The bonds were accordingly purchased by the defendants, but were charged to the plaintiff at a higher price than the amount paid for them, and other improper items were also included in the price. Before the maturity of the loan, and while the

<sup>1</sup> *Levy vs. Loeb* (N. Y. Ct. of App. Oct. 1881, not yet reported).

<sup>2</sup> *Id.*

<sup>3</sup> *Supra*. See also, in this connection, *Hardy vs. Jandon*, 1 Robt. 261, aff'd 41 N. Y. 619.

contract to carry was in force, the defendants for their own account, without the knowledge and consent of the plaintiff, sold the whole lot of original bonds. At the maturity of the loan the plaintiff was called upon to pay the alleged indebtedness, or be sold out—the amount demanded including the excess charged over the actual cost. Upon refusing, the defendants sold other and substituted bonds, and this “vicarious” sale demonstrated a large deficiency; whereupon the plaintiff brought an action to repudiate the alleged purchase and to recover the money paid upon it. The defendants set up a counter-claim for the deficiency. In the Court of Appeals the plaintiff’s claim was sustained, and the counter-claim of defendants rejected upon the grounds before stated. And if there be two different kinds of stock of the corporation, a pledgee must restore the same kind originally pledged with him. Accordingly, a pledge of fifty shares of “consolidated” Erie stock, cannot be restored or made good to the pledgor by assigning to him the same number of shares of “converted” stock. The pledgees are at least bound to restore stock of the identical kind pledged.<sup>1</sup>

(d.) *Dividends, Profits, Assessments, Calls, Interest.*

As a consequence of the declaration of the law that the stock as soon as it is purchased becomes the property of the Client,<sup>2</sup> it follows that all of the benefits in the way of accretions, interest, dividends, or profits which result therefrom belong to the latter.<sup>3</sup>

Under this rule, all profits or benefits of any description

<sup>1</sup> Wilson vs. Little, 2 N. Y. 443, 449.

<sup>2</sup> Gruman vs. Smith, 81 N. Y. 25; rev’g 12 J. & S. 389.

<sup>3</sup> Markham vs. Jaudon, 41 N. Y. 235; see also Gates vs. Halliday (Mo. Ct. of App.), 1 Am. Law Re-

view (n. s.), 172, as to right of pledgee to receive dividends. As to general subject of dividends, etc., see post, Ch. IX. The same rule is applicable to a pledge—viz., that all the profits, etc., belong to the pledgor (Schouler on Bailm. 197).

which the Stock-broker may derive from the loan or use of his Client's securities would, in the absence of agreement, belong to the latter.

But the pledgee of securities has the right to collect the dividends or interest thereon.<sup>1</sup> This is very properly the rule, for the securities are in his possession; and he has, as we have seen,<sup>2</sup> a right to have them transferred into his name upon the books of the company.

If, therefore, a pledgor of stock receives the dividends from the company, an action lies by the pledgee against him to recover the same.<sup>3</sup> And in the case of the Androscoggin Railroad Company vs. Auburn Bank,<sup>4</sup> the court held that where a bond with interest coupons attached was the subject of the pledge, there was an implied authority in the pledgee to collect the interest thereon.

On the other hand, the Client is subjected to all of the responsibilities of pure and absolute ownership; and he is liable, and not the Broker, for all assessments or calls of any kind made upon the stock while he is the owner thereof, although the Broker may have paid them, in the first instance, by reason of the stock being transferred on the books into his own name, in accordance with the usages of the business.<sup>5</sup> The general rule being that a pledgee of stock who has transferred the same on the books of the company is subject to all of the liabilities of a stock-holder.<sup>6</sup> By § 16 of the General Manufacturing Act of New York 1848, no person holding stock in any company organized under that law as executor, administrator, guardian, or trustee, or as collateral security, shall be per-

<sup>1</sup> Gates vs. Halliday, *supra*; Androscoggin Railroad Co. vs. Auburn Bank, 48 Me. 335; Hasbrook vs. Vandervoort, 4 Sand. 74.

<sup>2</sup> Ante, p. 137.

<sup>3</sup> Gates vs. Halliday, *supra*.

<sup>4</sup> *Supra*.

<sup>5</sup> McCalla vs. Clark, 55 Ga. 53.

<sup>6</sup> National Bank vs. Case, 99 U. S. 628; Pullman vs. Upton, 96 id. 328; Wheelock vs. Kost, 77 Ill. 296; In re Empire City Bank, 18 N. Y. 199; Holyoke vs. Burham, 11 Cush. 183. See also, as to liability for calls, Ch. IX.



sonally subject to any liability as stockholder of such company. In *Robbins vs. Edwards*,<sup>1</sup> where it appeared that a Broker, at the request of his principal, continued shares in his own name, the Master of the Rolls ordered the principal to repay to his Broker a call which he had paid, and to procure, as far as possible, that the shares should be registered in his own name.<sup>2</sup>

Another element of the transaction should be here noticed. The selling Broker is bound to deliver, upon receiving from the purchasing Broker the price agreed upon, a certificate of stock (if stock be the subject of the sale) for the number of shares purchased. This certificate must be in every respect proper and legal. It must be issued by the company, or its authorized officers or agents, and must show, on its face, that the person therein mentioned is entitled to so many shares in the capital stock of the corporation. Usually certificates of stock have forms of assignment endorsed on them, together with irrevocable powers of attorney, authorizing the officers of the corporation to transfer upon the books of the company the number of shares represented in the certificate to the person therein named. It is the duty of the selling Broker to procure this assignment to be duly executed by the person named in this certificate, as the sale would not be complete without it, although there might arise a case where this rule would not prevail.<sup>3</sup>

Upon the point as to what a Broker of a vendor sells on the Stock Exchange, the remarks of Lord Campbell, C. J., in *Stray vs. Russell*<sup>4</sup> are pertinent: "According to these usages,

<sup>1</sup> 15 W. R. 1065.

<sup>2</sup> To same effect, *Taylor vs. Stray*, 2 C. B. (n. s.) 175; *Chapman vs. Shepherd*, L. R. 2 C. P. 228; *Whitehead vs. Izod*, id.; *Emmerson's case*, L. R. 1 Ch. App. 433.

<sup>3</sup> See as to duty of selling Bro-

ker, on London Stock Exchange, Ch. V.

<sup>4</sup> 1 El. & E. 888, at p. 900. Where a Note-broker sold a note to another Note-broker without knowledge of the latter that it was worthless, and he is compelled to take it back from

the price of the shares is payable on the one broker handing over to the other the transfers and certificates. *What does the vendor contract to sell and deliver? Genuine transfers and certificates, with the interest and rights which they convey.* There might be a condition subsequent, imposing upon the vendor the onus of procuring the consent of the directors to the transfer, but I find no evidence of such a condition.”<sup>1</sup> And the point was directly passed upon in the last-named case,<sup>2</sup> that the selling Broker is not bound to procure a transfer or registration on the books of the company.

In practice, generally, this assignment is executed in blank by the person in whose name the shares stand on the books of the company, leaving the purchaser to fill in any name and to effect the transfer upon the books, if he so desire it.

Frequently, however, a certificate of stock, with the power of attorney executed in blank attached thereto, is passed from hand to hand, and is used in several different transactions before there is an actual transfer of the shares on the books of the company. But, by executing the certificate to the purchaser as between the latter and the seller, the purchaser becomes the owner of the shares.<sup>3</sup> Although, until the same is transferred on the books of the company, the seller is liable for any “calls” or assessments.<sup>4</sup> So a person is liable to the company for the amount of his subscription, although after calls were made, and before they were payable, he assigned his stock to a responsible party.<sup>5</sup> And if the purchaser does

his principal, the buying Broker is entitled to recover the amount paid to the selling Broker therefor. *Stewart vs. Orvis*, 47; *How. Pr.* 518.

<sup>1</sup> See also, to same effect, *Taylor vs. Stray*, 2 C. B. (n. s.) 175; *aff'd in Exch. Chamber*, *id.* 197.

<sup>2</sup> *Supra.*

<sup>3</sup> 1 *Lindley on Part.* (4th ed.) 706;

*Shellington vs. Howland*, 53 N. Y. 372.

<sup>4</sup> *Id.*; *Cutting vs. Damerel*, 23 Hun (N. Y.), 339. See also *Magruder vs. Colston*, 44 Md. 349; *Johnson vs. Underbill*, 52 N. Y. 203.

<sup>5</sup> *Schenectady R. R. Co. vs. Thatcher*, 11 N. Y. 102.

not procure the transfer upon the books of the company, and, in consequence, the seller is made liable for assessments or calls, the purchaser is bound to indemnify the seller in respect thereto, and from all liability accruing to the shares since the time they were sold.<sup>1</sup> On the other hand, the purchaser can compel the seller to execute a proper transfer, and to account for all dividends received by him since he ceased to be the equitable owner of the shares.<sup>2</sup>

In the United States, this question of transferring stock upon the books of the company has not received the attention which it has in England, because in the latter country, where most commercial corporations are organized by the payment of only a limited amount of the fixed capital, calls can be, and are generally, made upon the stockholders of record, and if the registration of the shares is not attended to, the shareholder of record may be compelled to pay the same, although he may have long since parted with his stock. The rule is the same in this respect in the United States.<sup>3</sup> But with us, corporations have either paid up their capital in cash, or its equivalent, pursuant to statutory enactment, and the stockholders are not generally liable for future calls. But the increasing number of corporations, and the frequent evasions of the requirements of the statutes authorizing the issuance of the entire capital for property by placing a fraudulently extravagant value thereon, may, and doubtless will, render the question of calls or assessments, and the necessity of seeing that a transfer or registration is made upon the books of the company when a sale is made, as important and essential as it is in England.<sup>4</sup>

<sup>1</sup> 1 Lindley on Part. (4th ed.) 707. ity for calls in England, see post, Ch. V. Where shares in a bridge company were issued as paid-up

<sup>2</sup> Id.

<sup>3</sup> Shellington vs. Howland, *supra*. shares, which were not fully paid

<sup>4</sup> For the subject of the liability, the transaction, though a fraud

In respect to the liability of the Client to pay interest, it is a well-understood rule of Stock-brokers to charge him legal interest upon the amount advanced by the Broker in the purchase of the stock; it is also the usage of the Brokers to charge the Client with any extra interest which the Broker is compelled to pay for carrying the stocks of the former caused by a stringency of the money market. Both of these usages are reasonable, and it does not seem to be difficult to sustain them by authorities.

Thus it has been held that an agreement for interest may be inferred from the course of dealing between the parties; as where interest has before been charged and allowed under the like circumstances.<sup>1</sup> Also, when the creditor has a uniform practice of charging interest, which was known to the debtor at the time of the dealing. And where there is a general usage in any particular trade or branch of business to charge and allow interest, parties having knowledge of the usage are presumed to contract in reference to it; and if the usage does not conflict with the terms of the contract, it will be deemed to enter into and constitute a part of it. Knowledge of the usage may be established by presumptive as well as by direct evidence. It may be presumed from the fact that both parties are engaged in the particular trade or branch of busi-

in law upon the creditors of the company, was made apparently in good faith by the company, and on its face was formal and regular, the shares appearing on the books as paid, and nothing appearing to apprise a purchaser that such was not the fact; a purchaser to whom the shares had been transferred without notice was not required to suspect fraud or institute inquiries where all seemed to be lawful and regular; and if he paid full value for the shares as paid up, he is not liable

to the creditors of the corporation under the statute for the amount actually unpaid on the shares. In order that the shares should be regarded as paid-up shares in the hands of an innocent purchaser, it is enough that they were in the usual form; it is not necessary that they should express upon their face that they were fully paid. *Key-stone Bridge Co. vs. McCluney*, Mo. Ct. of App., decided March 30, 1880; 1 Am. L. Rev. 395.

<sup>1</sup> *Easterly vs. Cole*, 3 N. Y. 503.

ness to which the usage relates, and also from other facts, as the uniformity, long continuance, and notoriety of the usage.<sup>1</sup>

In the case of *Robinson vs. Norris*<sup>2</sup> the question of the liability of a Client to pay interest which the Broker had been compelled to pay, beyond the rate established by law, was raised and indirectly sustained. There a Broker, authorized by his principal to borrow money in order to carry stocks for him, rendered an account to the latter by which it appeared that in borrowing money he had been compelled to pay to other persons, as commissions, sums exceeding the amount allowed by the laws of the State of New York<sup>3</sup> for effecting loans, and it was held that it was the duty of the principal promptly to object to the payment of such commissions; and in case he fail so to do, he cannot, in an action by the Broker to recover a balance due to him, insist that such payments were illegal and unauthorized.

And a charge made by a Broker for extra and usurious interest paid to enable him to carry his Client's stock was sustained,<sup>4</sup> on the ground that the Client had authorized the Broker to pay the same.

Where, however, the Broker is himself the lender of the money, he cannot charge a rate of interest beyond that allowed by statute; and the assent of the Client to the payment of such excess of interest cannot affect the operation of the laws forbidding usury. But, where a statute does no more than prohibit a recovery of interest in excess of 10 per cent., unless the contract is in writing, and does not otherwise make the rate of interest unlawful, interest in excess of that rate may

<sup>1</sup> *Id.*; *Calton vs. Bragg*, 15 East, 223; *Bruce vs. Hunter*, 3 Camp. 467; *Denton vs. Rodie*, *id.* 496; *Gwyn vs. Godby*, 4 Taunt. 346; *Eaton vs. Bell*, 5 B. & Ald. 34; *Ikin vs. Bradley*, 2 Moo. 206.

<sup>2</sup> 6 Hun (N. Y.), 233.

<sup>3</sup> 2 Rev. Stat. (5th ed.) 979.

<sup>4</sup> *Smith vs. Heath*, 4 Daly (N. Y.),

be included in an account stated; and money paid on account by the debtor may be applied to the payment of such interest by the creditor, in the absence of any appropriation by the debtor.<sup>1</sup> This proposition is laid down in *Marye vs. Strouse*, a case which arose out of dealings in certain mining stocks. In that case, it appeared that the Broker had a book called a "Broker's Pass-book," which contained an account of all the transactions between himself and his Client (being a copy of the Broker's ledger), the Client having possession of the book at all times, save when it was being "written up," after which it was again returned to him. The statute of Nevada<sup>2</sup> provides that "when there is no express contract in writing fixing a different rate of interest, interest shall be allowed at the rate of 10 per cent. per annum for all moneys. . . . Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due." The Broker, without any agreement in writing, charged his Client with interest at the rate of 2 per cent. per month, which sums were duly entered in the "pass-book" and known to the Client. Interest on all advances during the month, as well as on the balance brought forward from the preceding month, was charged at the same rate at the end of each month; and went into the balance struck. No objection was ever raised to these charges by the Client, and the court held that the facts constituted an account stated; and the agreement being fair and perfectly understood, and nothing in it opposed to the policy of the State or good morals, such interest could be included in the balance agreed to in stating the account.

And a right may be made to charge compound interest, either by express contract, or it may be implied from the

<sup>1</sup> *Marye vs. Strouse*, C. C. U. S. (Nevada); 5 *Fed. Rep.* 483.

<sup>2</sup> *Comp. Laws*, § 32.

mode of dealing with former accounts or custom;<sup>1</sup> but a Client is not bound, or affected by the practice of his bankers, to charge interest upon interest by making rests in their accounts at stated intervals, unless it be proved that he was aware that such was their custom.<sup>2</sup>

Any other expenses or actual disbursements which a Stockbroker makes for his Client, in pursuance of agreement or usage, would seem to be recoverable upon the principles laid down in the preceding cases; but it should be shown that the expenses have been actually incurred. Thus, in *Marye vs. Strouse*,<sup>3</sup> the Brokers sought to recover money laid out for telegrams. The Brokers were in the habit of receiving orders daily for the purchase and sale of mining stocks. It often happened that a number of orders would be sent to San Francisco in one despatch; in such case the practice was to charge each Client having an order thereon seventy-five cents (that being the proper charge for a single telegram of ten words), although such Client's proportion of the actual cost was often, if not always, less. But no effort was made to keep an account of the sums actually paid out for telegrams about the business of the particular Client sought to be charged. The Brokers, however, relied for recovering such charges on the ground that they were in accordance with an established usage of mining-stock Brokers; but the court rendered judgment against them on this point, holding that a custom or usage like the one in question, of charging not merely the actual cost of telegrams, but an arbitrary price, if it can be considered as reasonable, should be established by showing that both parties had knowledge of it.

<sup>1</sup> *Fergusson vs. Fyffe*, 8 C. & F. 121, Chitty on Cont. (11th Am. ed.) 957, 140.

<sup>2</sup> *Moore vs. Voughton*, 1 Stark, 487; ed.  
*Leask's Dig. Law of Cont.* 1107; <sup>3</sup> 5 Fed. Reporter, 483.

*(e.) Right of Client to Control and Take up Stock.*

Although, as we have seen, the stock in an ordinary speculation upon margin remains in the possession of the Broker, it is at all times, in the absence of express agreement to the contrary, subject to the orders of the Client.

The latter has the right to demand possession of the stock upon payment of the purchase price and the commissions and proper expenses.<sup>1</sup>

And where the Broker has deprived himself of the power of delivering the stocks to his Client by selling them, or otherwise disposing of them without, or contrary to, the instructions of his Client, an offer by the Broker to replace the stock does not bar the right of action of the Client, because where an agent has violated his duty or instructions, and made himself liable to an action for damages, nothing but payment of the damages, an accord and satisfaction, or a release, is a bar to the same. The offer of the Broker to replace the stock, so long as it is unaccepted, affects neither the principal's right to recover nor the measure of damages.<sup>2</sup>

If the Broker wrongfully hypothecate the stock, his Client can follow the same, and, upon payment of the amount due, compel the delivery of the stock to himself; and if the Client be compelled to pay to the third person an amount greater than that which he owes upon the same to the Broker, he can recover the surplus from the latter or his estate. So if the

<sup>1</sup> *Markham vs. Jaudon*, 41 N. Y. 235, at 247. This proposition is conceded even by Mr. Justice Grover in his dissenting opinion in that case. See also, as to right of Client to direct the stock to be bought in on a short sale, *Knowlton vs. Fitch*, 52 N. Y. 288; rev'g 48 Barb. 493. The same rule exists in the case of a pledge; the pledgor having the gen-  
eral property in the pledge may sell it, and compel its restoration upon paying the debt secured (*Rozet vs. McClellan*, 48 Ill. 345).

<sup>2</sup> *Clarke vs. Meigs*, 10 Bosw. (N. Y.) 337, 338; s. c. 22 How. Pr. (N. Y.) 340; *Gruman vs. Smith*, 12 J. & S. (N. Y. Sup. Ct.) 389; rev'd, on another ground, 81 N. Y. 25.



stock belonging to the Client be in the hands of a receiver or assignee of an insolvent Broker, the Client can recover the same upon payment of the amount due thereon. But where the Broker has so mixed the stock he has bought for his Client, in hypothecating it with several pledgees on separate loans by each, that no Client can identify any of the stock in the hands of any pledgee as the stock bought on his order, he cannot say it is his stock. And if, notwithstanding such hypothecation, the Broker had continued to hold stock enough to deliver to each Client all to which he might be entitled on paying the amount due from him to the Broker, the Client could not claim any right to the hypothecated stock; and this results from the rule heretofore referred to, that the Broker is not bound to keep on hand the identical stock purchased, but his obligation to his Client is fulfilled if he keep on hand sufficient like stocks, and be ready to deliver the same to his Client at any time that they are demanded. These positions were enforced in the recent case of *Chamberlin vs. Greenleaf*.<sup>1</sup> A pledgee, with whom securities belonging to several persons are pledged as collateral security for a loan made thereon to one having all the securities in his possession, and who wrongfully re-pledges or re-hypothecates them, should proceed *pari passu* in the application of the securities to the satisfaction of the loan, so that whatever loss should be occasioned to the parties whose stocks are wrongfully pledged shall fall on them ratably. Accordingly, if the pledgee, without notice of the claims of the true owners, sells the securities of one, thus realizing sufficient in amount to repay his loan on all the se-

<sup>1</sup> 4 Ab. New Cas. (N. Y.) 178; and See also *Gould vs. The Central Trust Co.*, 6 id. 381, for principle of measure of damage in a case where a Broker shallng assets realized from sale of hypothecates stocks belonging to pledged stocks which have been re-his general Clients and which cannot hypothecated. See also *Rich vs. Boyce*, 39 Md. 314.

curities, and leaving in his hands as surplus the securities of the others, a court of equity will order such surplus securities to be sold, and the proceeds applied so that the burden of the loan will be borne by all in equitable proportions.<sup>1</sup> And where a draft for money was intrusted to a Broker to buy Exchequer bills for his principal, and the Broker received the moneys and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America—and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and received the proceeds—held, that the principal was entitled to withhold the proceeds from the assignees of the Broker, who became bankrupt on the day on which he so received and misapplied the money.<sup>2</sup>

And where bankrupts, in their character of Stock-brokers, received dividends on dividend warrants intrusted to them, and pledged the dividend warrants for their own debt, they were ordered to be delivered up to trustees who had employed the bankrupts as their Brokers.<sup>3</sup>

And although Brokers are within the list of traders in the English Bankruptcy Acts of 1861 and 1869,<sup>4</sup> yet, in the event of such bankruptcy, a sum of stock or shares which the Broker has bought for his principal and taken into his own name are not in his order and disposition so as to pass to his assignees or trustee.<sup>5</sup> The theory of the law is, that the property of a principal, intrusted by him to his factor or Broker for any special purpose, belongs to the principal, notwithstanding any change which that property may have under-

<sup>1</sup> Gould vs. Central Trust Co. 6 D. & DeG. 613. As to doctrine of subpledging and rehypothecation, Ab. New Cas. (N. Y.) 381.

<sup>2</sup> Taylor vs. Plumer, 3 M. & S. 562. see p. 161.

<sup>4</sup> Taylor vs. Plumer, *supra*.

<sup>5</sup> Exp. Gregory vs. Wakefield, 2 M. <sup>5</sup> Id.

gone in point of form, so long as such property is capable of being identified and distinguished from all other property; and that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And if the property in its original state and form was covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the factor or agent, or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him.<sup>1</sup> The case of *Taylor vs. Plumer* was directly endorsed in *Ex parte Cooke*.<sup>2</sup> In that case, C., a trustee, employed a Stock-broker to make purchases of certain railway shares, informing him that it was for a certain trust fund in which he was interested. C. left the money with the Broker to make the purchase, which was duly made on the Exchange in the usual way for the next settling-day, the Broker in the meantime depositing the money in bank. Before the settling-day, however, the Broker failed, and moved for a declaration in the Bankruptcy Court that a portion of the money in the hands of the bankruptcy trustees belonged to C. This was refused by the registrar, on the ground that the transaction constituted the relation of debtor and creditor between C. and the Stock-broker, and not that of trustee and cestui que trust. But this decision was reversed on appeal, the appellate court holding that the Stock-broker had notice that the money belonged to a trust fund, and that the money could be traced. And the court also expressly said that, even if there had been no notice, the relation of the Stock-broker and C. was of a fiduciary character, so as to

<sup>1</sup> *Taylor vs. Plumer*, *supra*.<sup>2</sup> *In re Strachan*, L. R. 4 Ch. Div. 123.

make the case undistinguishable from *Taylor vs. Plumer*.<sup>1</sup> But a pledgor cannot follow the securities which he has placed with a pledgee in the hands of a purchaser in good faith from the pledgee, purchasing without notice of the pledge.<sup>2</sup>

#### *IV. Duty of Broker to Sell.—“Stop Order.”*

The Broker, when directed to sell, is bound to comply with the order, and to sell the stocks at the price named or at the market price, if that be the instruction. This consequence flows from the ownership of the stock. And the general rule is the same as in the case of an order to purchase—viz., that the Broker is bound to rigidly carry out the directions in respect to time, price, number of shares, manner, and place, and with prudence and caution and the utmost good faith.<sup>3</sup> An agent with express authority to sell has no implied authority to warrant, when the property is of a description not usually sold with warranty. One employed to make a sale of bank stock is not presumptively empowered to warrant it in the name of the principal, and the receipt of the proceeds by the

<sup>1</sup> See further, upon the subject of commingling funds and right of principal or cestui que trust to follow property, note to *Hooley vs. Gieve*, 9 Ab. New Cas. (N. Y.) 8, at p. 41. And the U. S. Supreme Ct., in the case of *The Central National Bank of Baltimore vs. Conn. Mutual Life Ins. Co.* 24 Alb. L. J. 454, 455 [Dec. 3, 1881], has decided that if money held by a person in a fiduciary capacity, though not as trustee, has been paid by him to his account at his banker's, the person for whom he holds the money can follow it, and has a charge on the balance in the banker's hands, although it is mixed with his (the depositor's) own moneys; and that the bank cannot

be permitted to assert its own claim to the balance of an agency account as against the beneficial owner when the bank has notice, either actual or constructive, of such equity. This view is also endorsed in the case of *Baker vs. N. Y. Natl. Bank*, decided by the N. Y. Ct. App. Oct. 1881. N. Y. *Daily Reg.* Nov. 9, 1881.

<sup>2</sup> *Little vs. Barker*, Hoff. Ch. (N. Y.) 487.

<sup>3</sup> See these questions discussed, ante, p. 118; *Bush vs. Cole*, 28 N. Y. 261; *Taussig vs. Hart*, 58 id. 425, 428; *Smith vs. Bouvier*, 70 Pa. St. 325; *Jones vs. Marks*, 40 Ill. 313; 1 *Lindley on Partn.* (4th ed.) 730; *Pulsifer vs. Shephard*, 36 Ill. 513.

owner of the stock, in ignorance of an unauthorized warranty by the agent, is not a ratification of the unauthorized engagement.<sup>1</sup> An authority to sell exists until countermanded or revoked by implication; but the question is greatly governed by usage and the course of dealings between the parties. Accordingly, where the defendants, Stock-brokers, were carrying certain stock for plaintiff on margin, and the latter, on Sept. 12, 1867, wrote to them, that "in case the stock should look like reaction, or weaken, or have a downward look, they should sell for him 50 or 100 shares, as the case might look;" to which letter, two days later, the defendants replied that they thought the market would recover from its present depression. On Sept. 17 the plaintiff ordered the defendants to purchase 100 shares, if the stock looked like rising. On the 18th the defendants bought for the plaintiff 50 shares, and on the 20th, the market falling rapidly, they sold all the plaintiff's stock without notice to him. Held, that the direction contained in the plaintiff's letter of the 12th was not revoked by what subsequently took place, and defendants were justified in selling upon the fall in the market.<sup>2</sup>

Where, however, an order has been given, in writing, to sell stock at a certain designated figure, evidence is admissible to show that the written order was subsequently modified by an oral understanding.<sup>3</sup> Parol evidence is also admissible to explain a Broker's contract for the sale of stock, acknowledging the receipt of the first payment of the margin.<sup>4</sup>

A Broker is not authorized to sell stock, standing in the name of two trustees, upon an order of one who undertakes to procure his co-trustee to join in the transfer, unless such

<sup>1</sup> *Smith vs. Tracy*, 36 N. Y. 79.

<sup>2</sup> *Davis vs. Gwynne*, 4 Daly (N. Y.), 218, aff'd 57 N. Y. 676.

<sup>3</sup> *Clarke vs. Meigs*, 10 Bosw. (N. Y.)

337. To same effect *Burkitt vs. Taylor*, N. Y. Ct. of App. (Oct. 1881), not yet reported.

<sup>4</sup> *Winans vs. Hassey*, 48 Cal. 634.

co-trustee authorized or concurred with the other in making the transfer.<sup>1</sup>

In this connection a practice of Wall Street should be adverted to and explained. Frequently a Client wishes to limit a loss upon stocks, in which case he gives his Broker what is called a "*stop order*," which authorizes and directs the Broker to sell the stocks (or to buy them in, as the case may be) when they arrive at a certain price, in which event the Broker must sell or buy when the price reaches his limit; with this reservation, however, that the price at which the Broker is directed to sell or buy must be made by some third person. This may be illustrated by the following example. If A, being the owner of 100 shares of New York Central R. R. stock, should direct his Broker to sell the same when the stock should reach or be quoted at 99, in this event it is the duty of the latter to sell at that price; not, however, until some other Broker, by a distinct transaction, has made the stock sell at 99, it being the understanding that a Broker cannot make that price himself by the sale of the stock. If, however, the Broker, when the stock reaches 99, is unable to sell at that price, it seems, by the usage of Wall Street, that he can sell at the next figure below 99.

Conclusions rather antagonistic to the above view seem to have been drawn in the case of *Smith vs. Bouvier*.<sup>2</sup> In that case the order was made by the Client in a transaction in which he was short of stocks, and was as follows: "Buy for my account 2000 shares, New York Central, at 166; or, in event of that stock going against me, take the 2000 shares in at 175." A Broker testified that "take in" means to buy. The Brokers acting under this order bought in the shares at an average of

<sup>1</sup> *Leyton vs. Sneyd*, 2 Moo. 583.

<sup>2</sup> 70 Pa. St. 325.

See also post, "*Joint Adventures in Stocks*," p. 173.

174½, or ⅜ below the price mentioned in the order. The question was squarely raised in the case as to whether this was an execution of the order; and the court said upon that point, in charging the jury, that "if the contract of the plaintiffs with the defendants was an absolute one, that they were not to buy in the stock until it reached 175; and if they had no discretion in the premises whatever, then, of course, they had no right to buy it in at a less price, and the plaintiffs' third point would be well taken; but is that a reasonable supposition? Is that the contract which was entered into? Was it not rather that the plaintiffs (as one of the Brokers testified to) were not to let the stock go beyond 175 before buying it in? and is not that a reasonable interpretation of the written order, in view of what was plainly the interest of the defendants, and of what occurred at that time?"

It will be seen that the learned judge left the question of the construction of the order to the jury, and did not pass upon it himself. The jury found for the Brokers, and, on appeal, the decision was affirmed, no allusion being made to this important question. Although the act of the Brokers in "buying in" the stock at 174½ might have been advantageous to their Client, it was not in accordance with the stop order, which gave them the right to act only when the stock reached 175. As we have seen, an agent or Broker must obey strictly his instructions, and it is no answer in his mouth to say that by disobeying them an advantage accrued to his principal.<sup>1</sup> Suppose the stock had never reached 175, but, after selling at 174½, it declined until it reached 166? Here would have been a loss to the Client from which it seems the Broker could not have escaped responsibility by showing a sale at 174½.<sup>2</sup>

<sup>1</sup> See cases cited ante, p. 118. Construction of writings a question of law. *Davis vs. Gwynne*, 57 N. Y. 676. where Broker is instructed to sell when margin should fall below 5 per cent., see *Wicks vs. Hatch*, 62 N. Y.

<sup>2</sup> For construction of stop order 535.

Where, however, a principal gives his Broker orders to sell gold for him if it reach a certain price, and that price is reached, and the Broker does not sell, but holds on, hoping in good faith to realize a still higher price for his principal, which is impliedly assented to by the latter, but, owing to a sudden fall, a sale at a lower price is finally made, the Broker is liable only for the actual loss sustained. He cannot be charged with any loss from a neglect to sell at the highest point reached.<sup>1</sup>

If the Broker fails to sell when directed, the principal may recover back, in an action of assumpsit on the common counts, the margin originally deposited by him with the Broker.<sup>2</sup>

With respect to the terms upon which the Broker is authorized to sell, he is likewise bound by the direction of the Client. If no directions are given, he is entitled to make the sale in accordance with the general usages of Brokers.<sup>3</sup>

The general rule is, that it is no part of the duty of a selling Broker to his employer to procure payment of the price, nor to procure the execution by the purchaser of a transfer of the shares, nor to procure the registration thereof.<sup>4</sup>

But this question is greatly influenced by usage, especially as to the duty of the Broker to receive payment for the stock sold; and we understand the usage of Wall Street to be decidedly in that way, and as establishing a uniform and unsailable practice on the part of the Broker to receive payment for securities sold, especially as the latter is invested with the possession of the stocks, and is clothed with the apparent ownership upon which purchasers rely, who do not even know the principal.<sup>5</sup> It has been held, however, that a Stock-broker cannot sell upon credit, for that is not the usual course of his

<sup>1</sup> *Hope vs. Lawrence*, 50 Barb. 258. 245; *Clark's Law of Joint-stock Companies* (Scotch), 145.

<sup>2</sup> *Jones vs. Marks*, 40 Ill. 313.

<sup>3</sup> Ch. VII., "Usages."

<sup>5</sup> *Clarke vs. Meigs*, 10 Bosw. (N. Y.)

<sup>4</sup> *Booth vs. Fielding*, 1 Week. Notes, 337.



business.<sup>1</sup> And where it appears that stocks are usually sold for cash, the Broker is liable for any loss which may occur by his selling on credit, although he may have been acting *bona fide*, and with the object of benefiting his principal.<sup>2</sup>

*V. Special Contract with Client.—Joint Adventures in Stocks.*

But the usual and customary obligations of a Broker may be varied and controlled by special agreement with his Client, it being established, that the former may by special contract limit his liability in any respect.<sup>3</sup>

In the case of *Milliken vs. Delion*<sup>4</sup> special authority was given to sell cotton "at public or private sale or otherwise, at his option, for the most that it would bring." The court held, that such a contract authorized the pledgee to sell at private sale without notice, and modified the ordinary rights of a pledgor to have notice of the time and place of sale; and that these general rules could be legally modified or waived by agreement. To the same effect was *Baker vs. Drake*,<sup>5</sup> where it was held, that by a special contract a Client might agree that his business should be conducted in accordance with the usage of a particular office, and that if such usage justified a sale of stocks where the margins were exhausted, without notice, the Client would be bound thereby. But a

<sup>1</sup> 2 Kent's Comm. 827, \*622 (11th ed.), note (b); *Baring vs. Corie*, 2 B. & Ald. 137, 143, 148; *Wiltshire vs. Sims*, 1 Campb. 258; *State of Illinois vs. Delafield*, 8 Paige (N.Y.), 527; s.c. 26 Wend. 192.

<sup>2</sup> *Brown vs. Boorman*, 11 Cl. & Fin. 1. But see as to Brokers generally, where usage justifies a sale on credit, *Goodenow vs. Tyler*, 7 Mass. 36; *Clark vs. Van Northwick*, 18 id. 343; *Van Alen vs. Vanderpool*, 6 Johns. (N.Y.) 69; *Douglass vs. Leeland*, 1 Wend. (N.Y.) 490.

<sup>3</sup> *Milliken vs. Dehon*, 27 N.Y. 364; *Baker vs. Drake*, 66 id. 518; *Markham vs. Jaudon*, 41 id. 235, at p. 244; *Wicks vs. Hatch*, 62 id. 535; *Stenton vs. Jerome*, 54 id. 480; *Hyatt vs. Argenti*, 3 Cal. 151; *Robinson vs. Norris*, 51 How. Pr. (N.Y.) 442; aff'd 6 Hun (N.Y.), 233.

<sup>4</sup> 27 N.Y. 364.

<sup>5</sup> 66 id. 518.

provision in an agreement of pledge by which the pledgor waives *notice* of sale is not a waiver of *demand* of payment before sale.<sup>1</sup>

*Wicks vs. Hatch*<sup>2</sup> is another case illustrating a dealing where there was a special contract. In that case, it appeared the plaintiff executed to G. A. W. a power of attorney empowering him to buy and sell gold, stocks, and bonds, and to execute for her, and in her name, "all orders, checks, or other instruments in writing whatsoever," which might, in his discretion, be necessary in the business, with power of substitution, etc. G. A. W. employed defendants as Brokers, depositing a sum as a margin. He gave to them a writing signed by him, as attorney for plaintiff, authorizing them to sell, in their discretion, at public or private sale, without notice, the stocks which they might be carrying for her, whenever the margin should fall below 5 per cent. In an action to recover damages for sales made at the Board of Brokers in pursuance of this authority, defendants set up as a counter-claim a deficiency arising on the sales after exhausting the margin. The court held that it was within the authority of G. A. W. to execute the writing, and defendants were authorized to sell at the Board of Brokers without notice, when in good faith, and in the exercise of a sound discretion, they deemed the state of the market justified it; that plaintiff was liable for any loss on sales beyond the amount of the margin; and that the same was proper as a counter-claim. The court charged, among other things, that defendants had a right to sell when the market rendered it prudent, either for the benefit or protection of their principal or for their own protection. Held,

<sup>1</sup> *Cortelyou vs. Lansing*, 2 Cai. 443; see also *Wilson vs. Little*, 2 (N. Y.) Cas. 200; see as to this case N. Y. 443.

*Barrow vs. Paxton*, 5 Johns. (N. Y.) 260, by which it is explained by 96. <sup>2</sup> 62 N. Y. 535, aff'g 6 J. & S. (N. Y.) 96. Kent, Ch. J., that it was never de-

no error, that from their peculiar relations as Brokers, holding stock paid for, mainly out of their own funds, defendants were authorized to act, and necessarily in making sales acted, for the protection of their own interest as well as that of their principal.

The late case of *Harris vs. Tumbridge*<sup>1</sup> illustrates a special contract with Brokers growing out of a "straddle." In that case, the plaintiff purchased through defendant, a Broker, a 60 days' "straddle"—viz., a contract by which the plaintiff had the option to either receive or deliver 100 shares of Lake Shore stock at 62½ for 60 days, the defendant further guaranteeing that the stock should fluctuate at least 8 per cent. The "straddle" remained in the hands of the defendant. The day after the making of the contract, the defendant, without express authority, sold "short" 100 shares of Lake Shore stock against the "straddle," and closed out the contract eventually at a loss to the plaintiff.

Immediately after the contract, Lake Shore began to advance in price, and reached 73½ a short time afterwards. The plaintiff, in an action on the "straddle," recovered a judgment; and the court held, that the subsequent action of defendant in purporting to sell "short" against the "straddle" was nugatory. It was his duty to have closed the "straddle" contract by exercising the option at a most favorable time within the sixty days; and a failure to do so made him liable for what plaintiff lost by his neglect, and that this result could not be affected by an alleged custom of Brokers not known to the plaintiff.

And where a Client, at the commencement of his dealings with a firm of Brokers, deposits with them money with an order to purchase stocks on his account, and receives from them an agreement for his signature, saying "We herewith

<sup>1</sup> 8 Ab. New Cas. 291; aff'd 83 N. Y. 92.

enclose our usual customer's agreement for your signature," and he signs and returns the same to them—which agreement authorizes the Brokers to sell, at their discretion, at the Brokers' Board or elsewhere, or at public or private sale, with or without advertising, and without prior demand of any kind, upon a notice to the Client of the time and place of sale, of all or any gold, stocks, property, things in action, or collateral securities held by them and belonging to the Client—the latter is bound by the terms of the agreement; and would have been bound, though he had never signed it or given any assent to it, if he subsequently gave orders under it.<sup>1</sup>

But where there is a special contract in writing between the Brokers and their Client, by which the ordinary principles applicable to such a relation are set aside or modified, and the dealings under such contract being fully closed, new transactions are subsequently entered into, the former written contract will not apply unless the parties have specially agreed thereto.

In *Bickett vs. Taylor*,<sup>2</sup> the Client, in November, 1870, signed a written agreement in respect to certain stock transactions between him and the Brokers. This agreement clothed the Brokers with the greatest possible power with respect to the use and sale of the stock, and subjected the Client to the most stringent obligations to keep his margin at all times at 10 per cent. The transactions under this agreement, and the accounts in respect to them, were fully closed. More than two years afterwards the Client bought stock through the Brokers, which the latter sold without notice for default of Client to keep up margins. Held, that evidence on the part of the Client to show that the former written contract was not

<sup>1</sup> *Robinson vs. Norris*, 51 How. Pr. (N. Y.) 442; *aff'd* 6 Hun (N. Y.), 233.      <sup>2</sup> 55 How. Pr. (N. Y.) 128.

applicable, but had been superseded by an oral arrangement, was proper, and the question should have been submitted to the jury. The court was inclined to the opinion, that under the circumstances, as *matter of law*, the previous written contract was ended, and did not apply to a fresh dealing between the parties.<sup>1</sup>

*Joint Adventures in Stocks.*

There are a few cases which illustrate a dealing in securities for speculation on joint account or for the joint benefit of the parties engaging therein.

It is not an uncommon occurrence in stock operations for the joint account of two or more persons, for one of the parties to furnish the "information," or facts, upon which the transaction is made, and the other person to contribute the capital or means to carry on the operation. And the courts have held, that the contribution of information which is used as a basis for operations in stocks is a sufficient consideration for an agreement to give the party furnishing the same an interest in the profits of the transaction.

In the case of *White vs. Drew*,<sup>2</sup> the plaintiff, being in possession of valuable information in relation to a certain stock, which he proposed to impart to defendant upon condition that, if defendant should consider it sufficiently important to warrant his acting upon it, he (defendant) should hold 5000 shares of such stock at cost for plaintiff's account and at his risk, and subject to his orders for a period of sixty or ninety days, to which defendant assented, and thereupon plaintiff imparted said information, which defendant accepted and acted upon, pronouncing it the best "point" he had heard of in a long

<sup>1</sup> See this case in Court of Appeals *sub nom.* *Bickett vs. Taylor* (Oct. 1881, not yet reported), where the above views were fully sustained. See also *Winans vs. Hassey*, 48 Cal. 634. <sup>2</sup> 56 How. Pr. (N. Y.) 53.

time, the court held that the moment the information was given, and the transaction assented to by defendant, it was an executed contract, and the defendant bore the same relation to the plaintiff in regard to this stock as Stock-brokers ordinarily bear to Clients for whom they are carrying stocks. The rule, that where one offers a reward for information he is bound by his contract to the one who responds to his offer, applies with equal force to the case where information is proffered by one and accepted by another under a contract by him to carry certain stocks for the benefit and profit of the party imparting the information. And reliable information, as to facts upon which the future price of a stock will depend, is a sufficient consideration to uphold an agreement or contract in relation to such stock. Such information, the court said, being concededly of great value, is just as effective to take the case out of the statute of frauds as if a cash payment had then been made.<sup>1</sup>

In *Marston vs. Gould*,<sup>2</sup> the parties engaged in a joint adventure in the purchase and sale of stock, under an agreement, by which defendant was to furnish the funds, and to bear the loss if the operations should result in loss; the net profits, if any, to be divided in certain proportions. No provision was made fixing a limit of time for the continuance of the operations, or for closing them and settling the accounts. The court held that the arrangement was terminable at any time at the will of either of the parties, and that either could maintain an equitable action against the other for an accounting or for the adjustment of losses sustained by the misconduct of the other, without regard to the question whether or not they were to be regarded as partners *inter sese*. By arrangement, the Brokers, through whom the joint operations were conducted, kept the account thereof under the let-

<sup>1</sup> 56 How. Pr. (N. Y.) 53.

<sup>2</sup> 69 N. Y. 220.

ter "M." By direction of defendant this account was closed, and the stock on hand, purchased under the agreement, was transferred to his individual account. It did not appear that the certificates of the stock were disturbed. In January, 1872, there was a sudden rise in the market, when plaintiff made a formal call upon defendant to sell the stock, and account to plaintiff for his portion of the profits; and, upon his failure to comply, brought this action. Upon the trial, defendant offered to prove that he sold all of the stock held on "M" account before January 9, 1872. This was excluded solely because not connected with an offer to prove that the sale was made avowedly on joint account. Held, error; that if defendant had authority to sell, it was not necessary to make known at the time of the sale that it was made on joint account; and if he made the sale in good faith in the ordinary way, plaintiff was bound.<sup>1</sup>

So in an action for an accounting on the purchase of stock, where the only question between the parties is, whether the purchase was joint or several, and the testimony is conflicting between them, the point will be considered settled in favor of the plaintiff, as a joint purchase, where it appears that the defendant had previously rendered an account to the plaintiff for the latter's share, adding interest and commission to that date, stating that the purchase was joint and containing the actual interest of each of them in the enterprise.<sup>2</sup>

Under an agreement for a joint venture in stock, to be held by one party for thirty days, the other party to bear all the loss, if any—held, that the former could not recover the deficiency on a decline in price without proving an actual sale at a loss within thirty days.<sup>3</sup>

<sup>1</sup> 69 N. Y. 220.

<sup>3</sup> *Monroe vs. Peck*, 3 Daly, 123.

<sup>2</sup> *Crosby vs. Watts*, 49 How. Pr. (N. Y.) 364.

So in an action on an agreement to pay a certain portion of the profits of a joint adventure, upon condition that information furnished by the plaintiff should prove true, the burden of the proof is on the plaintiff to show, that the information was true; although, if there were no such expressed condition, the burden would be upon the defendant to prove falsity, if he relied upon that defence.<sup>1</sup>

An interesting case upon the question of the right to participate in the profits of certain stock is that of *Jones vs. Kent*.<sup>2</sup> In that case defendant's intestate gave to the plaintiff a paper containing these words: "Received of J. W. Jones, by agreement, one thousand shares of St. Joe Lead stock, for which I paid him \$3000. The understanding is that I am to give said Jones one half of whatever price the same is sold for, when sold, over and above that sum." Whereupon the stock was delivered by plaintiff. The latter brought an action to enforce the trust, the stock having increased very much in value; and the court below held that the instrument expressed an absolute purchase and sale free from any trust, and gave exclusive discretion or option to the buyer as to whether he would sell, and, if so, when, subject only to the obligation to pay over one half of any excess in case he should choose to sell, and should sell at an advance. The Court of Appeals reversed this ruling, and decided that it was apparent, from an inspection of the writing, that the last clause was an inducement to the sale and part of the consideration thereof; and, the party making the instrument having died, his representatives would be compelled to carry the same into effect; but that plaintiff could not recover any dividends or other income received by defendant's intestate, the contract not covering the same. A portion of the stock, however, had

<sup>1</sup> *Strong vs. Place*, 4 Robt. 385; s. c.    <sup>2</sup> 80 N. Y. 585, rev'g 13 J. & S. 66.  
33 How. Pr. (N. Y.) 114.



been exchanged into bonds of the same company, and it was held that plaintiff was entitled to one half interest in the avails of the same, after deducting any money paid to complete the conversion of the stock into bonds.

The court did not pass upon the question whether the intestate had the right to choose the time of sale, so that this discretion could not be interfered with by the plaintiff. It would seem, however, that such agreements are to be construed according to the circumstances of each case, and that no general rule can be laid down. But it is clear that the party possessing the discretion cannot seek to exercise it unreasonably against the other party to the agreement.

So in an action to recover, with dividends, certain shares of telegraph stock, claimed to be in defendant's hands, and to belong to plaintiff, as assignee of S. & Co., it appeared that in March, 1854, the stock was placed in defendant's hands, under a contract that he was to do the best he could with it, "and to have one half of the proceeds." At that time the stock was comparatively worthless. Defendant retained the stock, and dividends were made upon it. In February, 1865, S. & Co. demanded the stock, which defendant declined to give up. No request was made to sell the same. When the demand was made it had reached a higher point than it had touched at any time since it was placed in defendant's hands.

Upon the trial, it was adjudged that plaintiff was the owner of the stock and entitled to a transfer thereof, and to the dividends received and interest thereon. But the judgment in respect to the dividends was modified, and it was held that plaintiff was entitled to the whole of the stock. On appeal this was held, error; that as no request was made to sell, and as no injury had accrued to plaintiff by the delay, and as there was no failure on the part of defendant to fulfil his contract,

he should receive one half of the avails of the stock and of the dividends actually paid to him.<sup>1</sup>

The case of *Butler vs. Finck*<sup>2</sup> should also be noticed in this connection, as bearing upon the question as to how far a joint speculation will constitute the parties engaged therein partners, so as to render one of them liable for the fraud of his co-operator. There the defendant entered into an agreement with his brother-in-law, B., to the effect that he should conduct certain stock speculations for B.'s benefit, collecting information of such a character as to justify the purchase of stocks, and giving his time and attention to the purchase and sale thereof; for these services he was to receive one third of the net profits, the margin to carry the account being furnished by B. The defendant knew that B. was a book-keeper in the employment of the plaintiff, and had no means outside of his salary. On April 23, 1879, the defendant, claiming that his share of the profits amounted to \$6818.48, received from B. an order upon his Broker for that sum, which was paid by the drawee. Subsequently B. absconded, and it was then learned that he had stolen bonds from the plaintiff, and pledged them to secure his account with the Broker, by whom some had been sold and others pledged. It appeared that the sum received by the defendant was, in fact, one third of the profits actually made by him while conducting the account, and also that B had, without his knowledge, speculated on his own account, both before and after the times referred to. It was not shown that the defendant knew that B. had stolen the bonds until after he had absconded. The defendant having refused to account to the plaintiff for the amounts received by him, an action was brought to recover damages for the conversion of the bonds; and, upon the trial thereof, the court

<sup>1</sup> *Wright vs. Wood*, 12 N. Y. *Week. Dig.* 529, Oct. 1881, N. Y. Ct. App.      <sup>2</sup> 21 Hun (N. Y.), 210.

directed a verdict for the plaintiff, for the entire amount lost by the abstraction of the bonds, on the theory that the defendant and B. were copartners in the transaction, and that the former was therefore liable for the acts of the latter. It was held, that this was error, and that the question as to whether or not a partnership existed between B. and the defendant should have been submitted to the jury. It was doubted whether in any event the defendant was liable for the amount actually received by him from B.

Where A, in pursuance of a parol authority from B, purchases stock in his own name on the joint account of himself and B, the latter becomes the owner of one half the stock, and liable to pay A the amount advanced therefor; and no written assignment of the stock from A to B is necessary, to render B liable for his proportionate share of the purchase-money.<sup>1</sup>

But where two parties agree to operate jointly in stocks, and one of them accordingly opens an account in his own name with a Stock-broker, without disclosing the name or interest of the other party in the transactions, and individually manages and directs the operation, and the Broker has no knowledge of the other person, the latter cannot recover his interest in the profits of specified operations, ignoring the balance of the account. He cannot isolate certain items from the account, and recover them simply for the reason that he had no interest in the other transactions going to make up the whole account from which losses resulted. The Brokers, having dealt in ignorance of the rights of the other owner, may insist that the entire dealings shall be closed, as if the person operating the account were the only one interested.<sup>2</sup> The mere fact that a check, paid out by a member of the firm, is in the name of the firm, is not sufficient notice to the parties

<sup>1</sup> *Stover vs. Flack*, 41 Barb. (N. Y.) (N. Y.) 303. See also *Jaycox vs. Cameron*, 49 N. Y. 645.

<sup>2</sup> *Read vs. Jandon*, 35 How. Pr.

receiving it that it is partnership property, nor enough to put them on inquiry before crediting the amount to the private account of the partner of whom they receive it.<sup>1</sup>

## *VI. Sales for "Short Account."*

### *(a.) Nature of "Short Sale."*

A "short sale" of stocks has already been defined. By such a sale the Client expects to be able to deliver the stock at a lower price. In case the sale of the stocks is made "regular" (that is, not upon time, seller's option), the party selling is bound to deliver them on the next day after the sale is made, in which case, not having the stocks which he has sold, he is compelled to borrow them, and to deliver such borrowed stocks. If, however, as is frequently the case, the stocks are sold deliverable in the future—that is, "seller's option" or "buyer's option"—then, and in such event, it is not necessary for the vendor to deliver the stocks until the expiration of the option, or until the buyer calls for them, as the case may be.<sup>2</sup> In *Knowlton vs. Fitch*,<sup>3</sup> Mr. Justice Rapallo defined a "short sale" as follows: "The nature of these sales has, in the many litigations which have come before the courts concerning them, been frequently proved, and is again explained in the testimony in this case. It is proven to be a sale before purchase, with a view of purchasing at a future time at a lower price. It is evident that, to carry out such a speculation, the stock sold must be temporarily procured by the seller for delivery to the purchaser. The manner in which this had been accomplished, in the course of the previous dealings between

<sup>1</sup> *Sterling vs. Jaudon*, 48 Barb. 459. *Knowlton vs. Fitch*, 52 id. 288, rev'g 48 Barb. 493; *Smith vs. Bouvier*, 70

<sup>2</sup> See, for cases defining "short sales," *White vs. Smith*, 54 N. Y. 166. Pa. St. 325; *Maxton vs. Gheen*, 75 id.

522; *Wicks vs. Hatch*, 62 id. 535; <sup>3</sup> 52 N. Y. 288.

the plaintiff and the defendants, is explained in the testimony. The plaintiff did not furnish the stock to deliver, but only margins. The defendants furnished the stock. They sold in the regular way, which is deliverable the next day, and then borrowed the stock of other parties to deliver. The profit or loss depended upon whether the stock rose or fell. The plaintiff had the right to direct his Brokers at any time to buy in the stock and close the transaction. Until bought in, the Brokers remained bound to the persons from whom they had obtained the stock, to return to them an equal number of shares, whatever might be the market price at the time it was demanded."<sup>1</sup>

A "short sale" was also defined, and the duties of a Broker considered, in the case of *White vs. Smith*.<sup>2</sup> It was there laid down that where a Stock-broker agreed for a commission to be paid to him, and upon a deposit with him of a stipulated margin, to make a short sale for a Client, the agreement is but partially performed by a sale; it is part of the bargain that the Broker shall carry the stock for a reasonable time, as otherwise the object of the transaction would be defeated. The Broker can close the transaction at any time if, upon demand and notice, the margin is not kept good; and he may

<sup>1</sup> A "short sale" of stocks is legal in Pennsylvania (*Smith vs. Bouvier*, 70 Pa. St. 325; *Maxton vs. Gheen*, 75 id. 166). In the case of *Appleman vs. Fisher* (34 Md. 540), a contract to sell gold "short" was upheld as legal. See also Chap. VII. "Stock-jobbing." "About ten years ago it became the practice to rig the market as regards the shares of particular joint-stock banking companies. A party would be formed, perhaps, owning none of the shares of the selected company, and they would proceed to sell considerable quantities of the shares, hoping so to damage the reputation of the company and lower

the value of the stock as to be able to buy up enough before delivery would be required. This noxious kind of speculation was checked by an Act of Parliament (30 Vict. c. 29, 1867), which now requires the seller of bank shares to specify the numbers or the registered proprietors of the shares which he is selling for future delivery" (*Jevon's Money and the Mechanism of Exchange*, pp. 210, 211). But the practice of selling stocks and securities "short" has prevailed for a very much longer time in this country. As to legality of "short sales," see title "Stock-jobbing."

<sup>2</sup> 54 N. Y. 522.

close it upon notice after he has carried the stock for a reasonable time. He has not the right, unless so expressly agreed, to buy in stock to cover the sale without notice to, or direction from, his Client, and by so doing he becomes liable for any loss he thus occasions his principal. In that case it appeared that, on the 18th of October, defendants (Stock-brokers), upon plaintiff's order and on his account, sold 300 shares N. Y. C. "short" at 186. On the 1st of November, without plaintiff's order or knowledge, they "bought in" stock to cover the sale. On the 2d of November, the stock having declined to 180 $\frac{1}{4}$ , plaintiff ordered defendants to cover their sale, to which no attention was paid. The court held that the plaintiff was entitled to recover, and that the proper measure of damages was the difference between the price at which the stock was sold short, and the market price upon the day when the order was received to purchase, with interest, deducting commissions, etc.

*(b.) Duty of Broker to Sell at Price Ordered.*

The Broker's duty, upon receiving an order to sell stocks short, is analogous to that which he owes in the case of a purchase. Where he is ordered to sell at a fixed price, he must, if possible, sell at such price; if at the market price, he must, as we have seen, sell at the best possible market price, being responsible to his Client for the non-exercise of ordinary care and diligence.<sup>1</sup>

*(c.) Nature of Contract made upon "Borrowing" Stock, and from whom the Stock may be Borrowed.*

The practice or usage in borrowing stocks is this: A Broker who has sold stocks "short" borrows the number of shares of stock sold from a fellow-Broker who has the stocks to loan,

<sup>1</sup> See ante, § III., sub. (a.), p. 118.

and pays him the market price for them. Although in semblance a sale, the full market price being paid and the stock delivered, it is, in effect, but a loan, and is so registered on the books of the respective Brokers. So, if the borrowed stocks fluctuate widely, either Broker can call upon the other to put up a sufficient margin to guard against loss until the stock is returned.<sup>1</sup>

For instance, a stock may be selling for \$100 per share when it is borrowed, and afterwards may decline to \$50 per share, in which case the borrowing Broker has stock which is only worth one half the amount which he has paid to the lender; in such a case the borrower has the right to call upon the lender to make up the difference by depositing a sufficient margin, and vice versa.<sup>2</sup> So, it seems, that a Broker who is "short" of stock for a Client may borrow the stock belonging to other Clients; no one can object to this arrangement but the Clients themselves whose stocks are borrowed, and it does not lie in the mouth of the person "short" to do it.<sup>3</sup>

Rapallo, J., upon this point, said: "The fact that the shares thus used belonged to a customer of the defendants can make no difference to the plaintiff. The result of the transaction was to leave the defendants liable to their customer as before, to deliver to him an equal number of shares when demanded. Whether or not the defendants were authorized thus to employ the stock of their customer depends upon the arrangements between them." In the case of *Dykers vs. Allen*,<sup>4</sup> Mr. Chancellor Walworth held, that an ordinary loan of a given number of shares of stock of a corporation amounts in substance to a sale, to be paid for in kind and quality, and the

<sup>1</sup> See Article XVII. § I. of By-laws of New York Stock Exchange; also Article XVIII. § 2.

<sup>2</sup> As to the measure of damages for refusal or neglect to return borrowed stock, see chapter "Measure of Damages."

<sup>3</sup> *Knowlton vs. Fitch*, 52 N. Y. 288,

rev'g 48 Barb. 593.

<sup>4</sup> 7 Hill, 497.

title vests in the borrower.<sup>1</sup> If a bonus be declared on stock loaned, while it is in the hands of a borrower, the lender is in equity entitled to the bonus.<sup>2</sup> This law fully accords with the practice of Brokers, who hold all dividends, interest, or other accretions to the stock for the account of the lender.

(d.) *Duty of Brokers to Close Short Contract by "Buying in" Stock.*

As we have seen,<sup>3</sup> the Broker has no right to buy in the stocks with which to cover or conclude a "short" sale, without the order or knowledge of the Client, unless, after notice and demand of additional margin, the latter fails to respond. Upon the order or request of the Client, the Broker must proceed to buy the stocks, and return them to the person from whom they were originally borrowed, and this closes the transaction. If the stocks can be purchased at a lower figure than that for which they were originally sold, the Client has made a profit; if otherwise, a loss. In the case of *White vs. Smith*,<sup>4</sup> the defendants, Stock-brokers, bought in stocks to complete a short sale without the authority of the plaintiff; and, subsequently, the latter directed them to make the purchase, which the defendants refused to do. The defendants contended that they were not under an obligation to act for the plaintiff, either for any fixed period or to any definite amount. But the court held the rule of law otherwise, and decided that, by the agreement by which the agency was created, no period was fixed for its continuance, and the only limit as to amount was fixed by margin or deposit; and that it could not be revoked by the defendants without notice; and a renunciation without such notice

<sup>1</sup> See also *Fosdick vs. Greene*, 27 Ohio St. 484; *Taylor vs. Ketchum*, 35 How. Pr. (N. Y.) 289.

<sup>2</sup> *Vaughan vs. Wood*, 1 M. & K. 403.

<sup>3</sup> *White vs. Smith*, 54 N. Y. 522.

<sup>4</sup> 6 Laus. (N. Y.) 5.



subjected the defendants to a liability for any damages the plaintiff might sustain thereby.<sup>1</sup>

In *Knowlton vs. Fitch*,<sup>2</sup> the plaintiff employed defendants, who were Stock-brokers, to operate for him in stocks. He was to furnish a margin, and keep it good without notice; defendants to care for themselves, if he did not. All the transactions were "short sales," defendants selling, deliverable the next day, and borrowing the stock to deliver until plaintiff directed a purchase to replace the stock borrowed. At the close of a transaction thus conducted, defendants had to the order of plaintiff \$1249.19. The latter then directed the sale of 100 shares of Michigan Southern. Defendants sold as ordered on account of plaintiff, borrowing the stock to deliver, and placing proceeds to plaintiff's credit. The stock rising in the market so as to exhaust the margin, defendants notified plaintiff to furnish more, and, upon his failure to comply, bought in, to replace the stock borrowed. In an action brought to recover the \$1249.19, held, that the defendants were authorized under plaintiff's order to sell and to borrow the stock for delivery; and, upon failure of plaintiff to furnish the necessary margin, they had the right to buy on his account; that the purchase was so made; and that therefore a finding that such purchase was not made for or on account of plaintiff was error. In the case of *Staples vs. Gould*,<sup>3</sup> the court held that where a Broker is employed to sell "short" certain stock, deliverable at any time within 30 days, at the option of the principal, and the Broker sells the stock as ordered, although the stock advances beyond the extent of the margin deposited with the Broker, the latter cannot buy in the stock, without the authorization of the principal, at any time before the 30 days have expired, the time for delivery

<sup>1</sup> This case was affirmed on appeal, 54 N. Y. 522.

<sup>2</sup> 52 N. Y. 288, rev'g 48 Barb. 593.

<sup>3</sup> 9 N. Y. 520.

limited by the contract. In that case the plaintiff, on the 15th of January, 1851, employed the defendant, a Broker, to sell for him 200 shares of Canton Company stock at \$66 per share, deliverable at the plaintiff's option, at any time within 30 days from date. At the same time, he deposited with the defendant the sum of \$750 "for the purpose of protecting the defendant against loss or damage in the business of such agency." In pursuance of his employment, the defendant on the same day made contracts for the sale to two firms specified in the agreement with defendant. The plaintiff did not at the time own any stock of the Canton Company. On the 20th of January, 1851, the defendant delivered to each of the purchasers the 100 shares of stock contracted to be sold by him, without the knowledge or consent of plaintiff, the stock on that day selling at \$80 and \$85 per share. At the expiration of the 30 days the stock was below \$66 per share. The plaintiff brought an action to recover back the money deposited with the defendant, and the court held that the plaintiff had a cause of action, but there could be no recovery under the Stock-jobbing Act.

The usage of Wall Street is, that where stock is sold deliverable at a future time, the parties to the contract can call upon each other for a deposit to meet fluctuations commensurate with the present market price of the stock. This can be repeated any number of times, so that each party will remain intact.<sup>1</sup> But it may be contended, that the legitimate effect of the case just cited would be to put the whole burden of the fluctuations upon the Broker, and to leave the Client entirely unburdened in a transaction consummated for his sole benefit, after his margin has been entirely exhausted by the rise in the price of the stocks. This does not seem to be reasonable, but the only relief against the decision would seem

<sup>1</sup> Art. XVII. § 1, By-laws N. Y. Stock Exchange; also Art. XVIII. § 2.

to be by providing in the beginning of the transaction, either by a deposit or special agreement, for the fluctuations of the market. The full force and influence of this view of the decision in *Staples vs. Gould* will be seen by the following illustration: A Client orders his Broker to sell 100 shares of stock "short," seller 60, at \$100 per share. The Broker executes the order upon receiving a 10 per cent. margin, or \$1000. Ten days after this sale the price of the stock is \$120, and fifty days after the sale it has risen to \$150. Yet it seems that the Broker cannot call upon his Client for further margin, nor buy in the stock without his consent. This is certainly contrary to the usage of Wall Street; and if the question were to clearly arise again, the courts would have good reason to reject the decision upon the ground that the case of *Staples vs. Gould* was really decided upon another point, and that it contradicts the law that the Client is impliedly bound to furnish margins to meet the fluctuations of the market.<sup>1</sup> Or, although no reference is made to this point in the opinion, the decision may be supported upon the ground that the plaintiff had the right to recover back his margins because the stock was bought in by the Broker, and the transaction closed, without any notice to him. While the theory of the law in this respect, when applied to general commercial subjects, is correct, that where goods are sold, deliverable within sixty days, at the option of the buyer, there is no liability on the part of the latter until the sixty days have accrued,<sup>2</sup> yet when applied to a Wall Street transaction, where the business is conducted from day to day upon present values, it works manifest hardship and injustice.

<sup>1</sup> See, upon this point, next sub. (VII.), p. 188.

<sup>2</sup> *Oelricks vs. Ford*, 23 How. (U. S.) 49.

*VII. Compulsory Sale by Broker.**(a.) For Failure to Put up Margins to Meet the Fluctuations of the Market.*

In the absence of an express contract providing otherwise, the law will not throw the burden or risk of loss from the fluctuations of the market upon the Broker, but will compel the Client, upon a proper demand by the former, to furnish margin sufficient to make the latter safe.

In a stock transaction such as we are treating of, it is expressly or impliedly agreed, that the margin shall be replenished, if the stock appreciates or depreciates, as the case may be; and, upon failure of the Client to do so, the stock may be sold upon reasonable and customary notice.<sup>1</sup>

The relation which exists between a Broker and his Client in the purchase of stocks has already been considered,<sup>2</sup> and it follows, from the establishment of the relation, that the Broker cannot summarily, without any previous demand of margin, dispose of his Client's stocks. He is bound to give the latter notice that his margin is diminished, and that further margin is required.<sup>3</sup>

An injunction, however, will not be granted to restrain a Stock-broker from selling stocks deposited with him as a margin in a speculative transaction, upon a mere general averment of irreparable injury, without showing in what respect this injury will be entailed. Where there is no averment or

<sup>1</sup> *Gruman vs. Smith*, 81 N. Y. 25; <sup>2</sup> *Supra*, p. 101 et seq., and cases there cited.

10 N. Y. *Weekly Dig.* 63, rev'g 12 J. & S. (N. Y.) 389; *Knowlton vs. Fitch*, 52 N. Y. 288; *Stenton vs. Jerome*, 54 id. 480; and cases cited at p. 103. See, as to similar rule where grain is bought upon margin on the Board of Trade of Chicago, *Corbett vs. Underwood*, 83 Ill. 324; *Moeller vs. McLagan*, 60 id. 317.

<sup>3</sup> *Id.*; *Baker vs. Drake*, 66 N. Y. 518; *Gruman vs. Smith*, 81 id. 25; *Ritter vs. Cushman*, 35 How. Pr. (N. Y.) 284; s. c. 7 Robt. 294; *Hanks vs. Drake*, 49 Barb. 186; *Stenton vs. Jerome*, 54 N. Y. 480.

proof of the Stock-broker's insolvency, the fact of a "low" market is not enough to justify the issuing of an injunction. The plaintiff in such a case has a perfect remedy at law in damages for the conversion of his stocks, if they are improperly sold.<sup>1</sup> Nor can a pledgor resist the sale of the stock on the ground that it can only be made at a great sacrifice.<sup>2</sup>

So where there is a written contract for the delivery of certain merchandise at a given price, to be delivered within a named time at the option of the seller, evidence offered by the purchaser of a usage existing, by which a "reasonable" margin should be put up to meet the fluctuations of the market, is rightfully excluded, because it is too indefinite and uncertain to establish a usage. Moreover, where there is no doubt or ambiguity on the face of the contract, evidence of the usage is inadmissible.<sup>3</sup>

*(b.) Form of Notice; Upon whom Served; Reasonable Time.*

There is no set form which the Broker is obliged to use in making this demand for more margin. Any language is sufficient which brings clearly home to the Client a notice that additional margin is required.<sup>4</sup>

In one case<sup>5</sup> the demand for more margins was made orally, and this, no doubt, is equally as effective as a written demand, if it can be clearly proved.

But it seems that a demand for margins should specify the sum required; yet the Client may use such language as "I have no money," which will obviate the necessity of the sum being mentioned.<sup>6</sup> A notice without date or signature, left in

<sup>1</sup> *Park vs. Musgrave*, 2 T. & C. Corbett vs. Underwood, 83 Ill. 324; (N. Y.) 571. Moeller vs. McLagan, 60 id. 317.

<sup>2</sup> *Rasch vs. His Creditors*, 1 La. Ann. 31. <sup>5</sup> *Cameron vs. Durkheim*, 55 N. Y. 425.

<sup>3</sup> *Oelricks vs. Ford*, 23 How. (U. S.) 49. <sup>6</sup> *Cameron vs. Durkheim*, supra; *Stenton vs. Jérôme*, 54 N. Y. 480, at 486. See also *Burkett vs. Taylor*

<sup>4</sup> *Milliken vs. Dehon*, 27 N. Y. 364; *Cameron vs. Durkheim*, 55 id. 425; (N. Y. Ct. of Appeals, not yet reported, Oct. 1881).

the pledgor's office, stating that if a specified amount of the loan was not paid the stock would be "used," does not constitute a demand sufficient to authorize a sale.<sup>1</sup>

Respecting the person upon whom the demand should be made, the general rule is that it should be served upon or made to the Client in person, although there are circumstances which would justify the service of the same upon an agent or representative of the latter.<sup>2</sup>

It may be made upon the clerk of the Client employed by him in that particular transaction, or upon a confidential clerk of the Client, where the latter is absent from the city.<sup>3</sup>

So a notice left at the dwelling or place of business of the Client would seem to be sufficient. Shaw, Ch. J., lays down the rule<sup>4</sup> that "all notices at one's domicile, and all notices respecting transactions of a commercial nature at one's known place of business, are deemed in law to be good constructive notice, and to have the legal effect of actual notice."<sup>5</sup>

In *Burkett vs. Taylor*,<sup>6</sup> the Court of Appeals of the State of New York intimated that where a Client had given a place to the Brokers where all notices should be delivered, a notice sent to a different address would not be sufficient.

In the case of *Milliken vs. Dehon*,<sup>7</sup> the facts showed that the transaction had been negotiated through one D., a clerk of the plaintiff, who sometimes did out-door business for him, and that he acted as plaintiff's agent in the transaction in question. On this evidence the question was left to the jury, whether D. was authorized by the plaintiff to receive the no-

<sup>1</sup> *Genet vs. Howland*, 45 Barb. 560.

<sup>2</sup> *Cameron vs. Durkheim*, and cases supra.

<sup>3</sup> *Milliken vs. Dehon*, 27 N. Y. 364; *Cameron vs. Durkheim*, supra; and cases heretofore cited.

<sup>4</sup> *Granite Bank vs. Ayers*, 33 Mass. 392.

<sup>5</sup> See also, to same effect, *Bryan vs. Baldwin*, 7 Lans. (N. Y.) 174; and cases cited under sub. (c.), post, p. 196; *Burkett vs. Taylor*, supra.

<sup>6</sup> Court of Appeals, not yet reported, Oct. 1881.

<sup>7</sup> 27 N. Y. 364.

tice, and that this would depend upon whether D. acted as plaintiff's agent or not. The jury having found that he did act as agent, the instruction was upheld by the appellate court. In delivering the opinion, Marvin, J., said: "It is also insisted that the defendant was bound to make a demand of payment of the margin personally of the pledgor, and that notice to redeem should have been given personally, and so as to the time and place of sale. . . . It seems to me that a demand upon an authorized agent, or notice given to him, is, in law, equivalent to a notice to the principal, and no reasons occur to me why such demand or notice should not bind the principal. It is not a proceeding by which a personal judgment is to be recovered. A different rule would often be very inconvenient."<sup>1</sup>

And where several are jointly bound to do an act upon notice to them, notice to one is sufficient.<sup>2</sup>

Another very important inquiry is as to the length of time which the Broker should give the Client to respond; this cannot be definitely stated, but the Client should be allowed a reasonable time<sup>3</sup> within which to comply with the demand; and what constitutes a reasonable time depends upon the peculiar circumstances of each case. It may be an hour, a day, or a week, depending in each case upon the situation of the parties; the character of the market, or the nature of the stock.<sup>4</sup>

In *Burkett vs. Taylor*,<sup>5</sup> the court intimated that a notice to

<sup>1</sup> To same effect, *Bank of U. S. vs. Stewart vs. Drake*, 46 id. 449; *Maryland Fire Ins. Co. vs. Dalrymple*, 25 Md. 242; *Willoughby vs. Comstock*, 3 Hill (N. Y.), 389; *Byran vs. Baldwin*, 7 Lans. (N. Y.) 174; *Burkett vs. Taylor*, N. Y. Ct. of Appeals, not yet reported, Oct. 1881.

<sup>2</sup> *Mandeville vs. Reed*, 13 Ab. Pr. (N. Y.) 173.

<sup>3</sup> *Markham vs. Jandon*, 41 N. Y. 235, at 243.

<sup>4</sup> *Cameron vs. Durkheim*, 55 N. Y. 425; *Milliken vs. Dehon*, 27 id. 364;

<sup>5</sup> *Supra*. See also *Genet vs. Howland*, 45 Barb. 560.

a Client demanding additional margins before twelve o'clock of the day on which it is dated would not be a sufficient notice in point of time; also that a notice such as above should specify the time and place of sale in case of default to supply additional margins.

So where the Broker and his Client lived in the same city, a notice for margins, or in default thereof the stock would be sold in two days from the date of the demand, was held timely and reasonable.<sup>1</sup> In that case defendants, Stock-brokers in the city of New York, purchased for plaintiff certain stocks under an agreement that they were to advance the money for the purchases, and he was to keep with them a satisfactory margin or security. A portion of the stock was sold by defendants without giving plaintiff notice of the time and place of sale. Plaintiff repudiated and disavowed the sale. Defendants acceded to such disavowal, and notified plaintiff they would not consider the sale as made on his account, but on their own; and by both parties it was subsequently treated as a nullity as between them. After that defendants notified plaintiff to furnish additional margin, and upon his failure so to do, in the afternoon of the 28th of April, served upon him personally a notice that unless a satisfactory margin was furnished, or the balance of his account paid, his stocks would be sold at public auction upon the 30th of April, at 12.30 P.M., at a place designated; and the stocks were sold in accordance with the notice. The plaintiff was held to have waived his right to recover as for a conversion of the stocks sold at the first sale. His default in furnishing a satisfactory margin, or paying the balance of the account, entitled the defendants to enforce their lien by the sale of the stock; and, the parties living in the same city, the notice of sale was a timely and reasonable one, and the sale legal. It was held;

<sup>1</sup> *Stewart vs. Drake*, 46 N. Y. 449.



further, that in an action brought to recover damages for the alleged unauthorized sale of the stock, the answer setting up a counter-claim, it was proper for the referee to state an account between the parties, and to give judgment in favor of defendants for any balance found due them.

In the case of *Gruman vs. Smith*,<sup>1</sup> the court said: "Upon failure to do so [furnish margins], the stock may be sold upon reasonable and *customary* notice."

It thus seems that, in respect to the time given by the notice to comply with the demand, the usages of Brokers may be well introduced to establish a limit, as this is one of the elements which may be assumed as understood in the inception of the relation of Broker and Client.<sup>2</sup>

In *Milliken vs. Dehon*,<sup>3</sup> which arose out of a transaction in cotton, similar in substance to a stock speculation, the pledgee, as he may be termed, gave the pledgor notice that, if the latter did not make his margins good the next day, he would sell the cotton, which was done, and there was no point raised in the case that the notice was too short.

But a case<sup>4</sup> which arose out of a speculation in gold most strongly illustrates the question of what is a reasonable time in this respect. There the Brokers had made oral demands for more margins, to which the Client stated, in effect, that he had no money and was ruined, and that the Brokers must take care of themselves, whereupon the latter closed the account by a settlement. This the Court of Appeals held not only to be a waiver on the part of the Client of any more formal demand, but that it also authorized the Brokers to close the account in the manner in which they did. *Church, Ch. J.*, in delivering the opinion of the court, said: "The defendants had sold \$404,000 of gold short for the

<sup>1</sup> 81 N. Y. 25.

<sup>2</sup> See chapter on "Usages."

<sup>3</sup> 27 N. Y. 364.

<sup>4</sup> *Cameron vs. Durkheim*, 55 id. 425.

plaintiff, and, according to the usual custom in transacting that business, had borrowed the gold to deliver. They had received from the avails of the gold sold, and from the plaintiff, payment for the gold at 140. On the morning of the 23d gold was quoted at  $140\frac{1}{2}$ , and at night it reached 143. On that day the defendants called upon the plaintiff for an additional margin of \$7481.05, which would secure the gold at  $141\frac{1}{2}$ . The plaintiff was absent from the city on that day, and his clerk delivered some collaterals to the defendants, accompanied by a promise to give a check the next morning, which was not done. On the morning of the 24th, at ten o'clock, gold opened at 150, and rose rapidly until, at about half-past eleven o'clock, it reached  $162\frac{1}{2}$ , and at a quarter-past twelve the market broke and went as low as 136, and soon after dropped to 133. The effect of the sudden and unprecedented rise in gold, as the evidence shows, was to produce the most intense excitement and consternation among those concerned in such transactions. At one time the plaintiff was deficient in margin more than \$80,000, while within an hour afterwards he might have closed the transaction with a balance in his favor of something over \$25,000. The interviews between the parties took place during the height of the excitement, when everything was uncertain. Whether gold would depreciate or go to a much higher figure, whether the rise would continue during the day or for several days, and whether it would remain permanent or not, were questions of doubt and apprehension. When the defendants called for additional margins, as they had a right to, if the plaintiff did say to them in earnest and seriously, as claimed, 'I have no money; I cannot put up any more margin. This ruins me: I hope it won't ruin you; you must take care of yourselves,'—it was pregnant with authority and consent that the defendants might take any course to save themselves from loss which

would be deemed prudent and judicious under the circumstances in which they were placed. It could scarcely have been more significant if the language had been, 'The sudden rise in gold ruins me, and I now authorize you to adopt any course which will be most likely to save yourselves from loss on my account.' This is the natural import of the language."<sup>1</sup>

In another case<sup>2</sup> the plaintiff employed the defendants, Stock-brokers, to buy certain stocks on time, making and agreeing to keep good, in the defendants' hands, a deposit, to indemnify them against depreciation in the market value. The stocks having fallen after their purchase, the defendants called on the plaintiff for a further deposit, and he replied that it was not convenient that day, but that he would make it the next day. At the same interview he gave them written authority to sell in these terms: "Please sell for my account 200 Ill. Central R. R. at 51." After receiving this written authority, the defendants sold the stocks the same day at 52. In an action against the defendants for making the sale, evidence was adjudged competent, on the part of the plaintiff, that it was agreed at the same interview, and before giving the authority to sell, that the defendants should wait until the next day for a further deposit, and that if the stock went down to 51 meanwhile (at which point the existing deposit would be exhausted), the defendants might sell the stock. This evidence does not contradict the written power. And such an agreement to delay is not void as being without consideration.

The reasonableness of the notice may also depend upon previous dealings between the parties.

<sup>1</sup> But compare *Burkett vs. Taylor*, supra, and *Genet vs. Howland*, 45 Barb. 560.      <sup>2</sup> *Clarke vs. Meigs*, 10 Bosw. (N. Y.) 337, 338.

So where the question was whether reasonable notice to make a deposit had been given by Brokers to their principal, and all the evidence on the subject was that furnished by a former transaction between the same parties, in which the same notice was given—the Brokers waited until the next morning, when the deposit was made and it was satisfactory—the court held that the principal had a right to suppose that the same course of dealing which had occurred in the former transaction, and was satisfactory to the Brokers, was expected in the present case; and that if the Brokers required compliance in any shorter time, they should have given notice accordingly.<sup>1</sup>

(c.) *Notice of Sale for Failure to Comply with Demand for Margins.*

But the mere failure of the Client to furnish margins, after notice of decline or advance in the market, as the case may be, and a demand for margins, is not sufficient to authorize a Broker to sell the stock or close the transaction. He must also give notice of the time and place of sale to the Client.<sup>2</sup>

<sup>1</sup> *Hanks vs. Drake*, 49 Barb. (N. Y.) 186; as to whether this case is overruled on this point, see *Markham vs. Jaudon*, 41 N. Y. 243, per Hunt, Ch. J. See also cases cited under succeeding paragraph. So a pledgee cannot sell or dispose of the securities until payment of the note is demanded and refused (*Lewis vs. Varnum*, 12 Ab. (N. Y.) Pr. 305).

<sup>2</sup> Cases cited under preceding subdivisions, *Gruman vs. Smith*, 81 N. Y. 25; *Stewart vs. Drake*, 46 id. 449, 450, and 453; *Wheeler vs. Newbould*, 16 id. 392; *Read vs. Lambert*, 10 Ab. (N. Y.) Pr. n. s. 428; and see, generally, *Cortelyou vs. Lansing*, 2 Caines (N. Y.) Cas. 200; *Fletcher vs. Dickinson*, 89 Mass. 23; *Morris Canal and Banking Co. vs. Lewis*, 12 N. J. Eq. 323; and cases cited under succeeding paragraph. Also *Schouler on Bailm.* 207, note 3. When usage justifies Broker in selling without notice, see *Corbett vs. Underwood*, 83 Ill. 324. In this case it was held that where a commission merchant contracts for the purchase of grain for another, to be delivered at a future time, the principal making an advance on the purchase, which is in the merchant's name, and agrees to keep the margin good up to the time of delivery, the relation of pledgor and pledgee will not be created, so as to require a notice of the time and place of a sale on failure to keep up the margins.

So, in England, Stock-brokers who have with their own money pur-

In respect to the form or contents of the notice to the Client, no uniform rule can be laid down. No peculiar terms or words need be used. It may be oral or in writing; and it will be sufficient, if it conveys, by plain and simple language, the nature of the property to be sold, and the time and place of such sale. The notice should state the *time* and *place* of sale.<sup>1</sup> In respect to the *time* of sale, the general principle is that it should be *reasonable*. What constitutes a reasonable time depends upon the peculiar circumstances of each case, and no uniform rule can be laid down. The nature of the stock, the residence of the parties, and all the other elements and characteristics of the particular transaction control the question.<sup>2</sup> It is not necessary that this notice of sale should be made separately from, or subsequently to, the demand for more margins. They may both be embraced in one notice.<sup>3</sup>

In respect to the person upon whom this notice should be served, it has been decided several times that, in case of a pledge, there must be *personal* notice of the sale to the pledgor, or a notice left at his residence; and that if the pledgor cannot be found, so as to be served in this manner, resort must be had to judicial proceedings to foreclose the

chased stock for a principal are authorized to close a transaction without notice when it is apparent that their Client will be unable to respond to any loss, by reason of bankruptcy, death, or insolvency of the latter (Lacey vs. Hill [Scrimgeour's Claim], L. R. 8 Ch. App. 921; see also Colket vs. Ellis, 10 Phila. 375; s. c. 32 Leg. Int. 82).

<sup>1</sup> Burkett vs. Taylor, N. Y. Ct. of App. unreported, Oct. 1881; Lewis vs. Graham, 4 Ab. (N. Y.) Pr. 106; Castello vs. City Bank, 1 N. Y. Leg. Obs. 25; Markham vs. Jaudon, 41 N. Y. 235, at 243; Edwards on Bailm. (2d ed.) § 286 and note 3; Diller vs. Brubaker, 52 Pa. St. 498; Conyngham's

App. 57 id. 474; Gay vs. Moss, 34 Cal. 125; Robinson vs. Hurley, 11 Iowa, 410.

<sup>2</sup> See this question considered in the preceding subdivision (b.). Morris Canal Co. vs. Lewis, 12 N. J. Eq. 323; Diller vs. Brubaker, supra; Conyngham's App. supra; Gay vs. Moss, supra; Little vs. Barker, Hoffm. Ch. 487; Genet vs. Howland, 45 Barb. (N. Y.) 560; s. c. 30 How. Pr. 360; Lewis vs. Graham, 4 Ab. (N. Y.) Pr. 106; Ogden vs. Lathrop, 3 J. & S. (N. Y.) 73; rev'd 65 N. Y. 158.

<sup>3</sup> Stewart vs. Drake, 46 N. Y. 449; Gruman vs. Smith, 81 id. 25; Cameron vs. Durkheim, 55 id. 425; Stenton vs. Jerome, 54 id. 480, at 486.

rights of the latter.<sup>1</sup> But notice to an authorized agent is sufficient.<sup>2</sup> And where it is impossible to give notice by reason of the acts of the pledgor, a sale may be made without notice.<sup>3</sup> And in some instances a sale may be made after publication of notice thereof in a newspaper.<sup>4</sup>

The case of *Wheeler vs. Newbould*,<sup>5</sup> although not one arising out of any stock transaction, is frequently met with in stock cases upon the question of the manner in which the pledgee should proceed to sell the pledge.

The defendant, in that case, purposely withheld from the plaintiff all knowledge of the time, the place, and manner of sale, and the sale, when effected, was made privately for about three fourths of the actual and nominal value of the securities. The court held that this was illegal.

It was said by Brown, J., that, "if we assume that the defendant had authority to sell the subject of the pledge in satisfaction of his debt, it was nevertheless his duty to give to the plaintiff personal notice of the time and place of the sale. . . . And personal notice to the pledgor to redeem and of the intended sale must be given as well in the one case as in the other (whether the debt be payable presently or on time), in order to authorize a sale by the act of the party;<sup>6</sup> and if the pledgor cannot be found, and notice cannot be given him, judicial proceedings to authorize the sale must be resorted to. Before giving notice, the pledgee has no right to sell the pledge; and if he do, the pledgor may recover the value

<sup>1</sup> *Stearns vs. Marsh*, 4 Denio, 227; *Garlick vs. James*, 12 Johns. 146; *Story's Eq. Jur.* § 1008; *Strong vs. Nat'l Bank'g Ass'n*, 45 N. Y. 718; *Bryan vs. Baldwin*, 7 Lans. (N. Y.) 174; *Donohoe vs. Gamble*, 38 Cal. 340; *Pigot vs. Cubley*, 15 C. B. (n. s.) 701; *City Bank of Racine vs. Babcock*, 1 Holmes (C. C. U. S.), 180.

<sup>2</sup> *Potter vs. Thompson*, 10 R. I. 1. 227.

<sup>3</sup> *City Bank of Racine vs. Babcock*, supra.

<sup>4</sup> *Stokes vs. Frazier*, 72 Ill. 428. See also cases cited under preceding subdivision (b.). As to how far this rule may be affected by waiver, see post, pp. 204, 212.

<sup>5</sup> 16 N. Y. 392.

<sup>6</sup> *Stearns vs. Marsh*, 4 Denio (N. Y.),

of it from him without tendering the debt." After a pledgee, however, has called upon the pledgor to pay the debt, and has given legal notice of sale, he is not bound to proceed and sell the same.

And this doctrine has been directly applied to the case of a transaction between a Stock-broker and his client by the Supreme Court of Pennsylvania,<sup>1</sup> where it was decided that, upon the failure of the Client to respond to a proper demand, a Broker who is carrying stock for him, and who notifies the latter by letter to increase his margin or take up the stock, is not bound to sell in default of receiving an answer.

The rule is, that a pledgee of stocks or securities is under no obligation to sell the security after default in payment of the debt.<sup>2</sup> In the *Granite Bank vs. Richardson*,<sup>3</sup> a creditor holding as collateral security certain bank shares requested the debtor to pay the debt, and notified him that if the request were not complied with immediately the shares would be sold. The debt was not paid, and the pledgee did not sell. The bank subsequently failed, and the shares became worthless. The creditor then began an action to recover the money due him, and it was held that his failure to sell the shares constituted no defence. There was no duty on the part of the pledgee to sell the shares; he simply held them as security, with perhaps the power to sell attached. The debtor's remedy was to pay the debt and redeem the shares. But where the pledgee or Broker neglects to sell after request or demand so to do from his pledgor or Client, it may be that the former would be liable for any loss which might occur in consequence of his omission to sell.<sup>4</sup> Where a pledgee, however, has ac-

<sup>1</sup> *Esser vs. Linderman*, 71 Pa. St. 76.      *Howard vs. Brigham*, 98 id. 133; *Williamson vs. McClure*, 37 Pa. St. 402;

<sup>2</sup> *O'Neill vs. Whigham*, 87 Pa. St. 394; s. c. 7 Reporter, 245; *Robinson vs. Hurley*, 11 Iowa, 410; *Granite Bank vs. Richardson*, 47 Mass. 407;

<sup>3</sup> *Supra*.

<sup>4</sup> *Howard vs. Brigham*, *supra*; *O'Neill vs. Whigham*, *supra*.

quired the right to sell for his own protection, either by a demand or notice, or by waiver of such demand and notice, "all he need do is to act in good faith."<sup>1</sup>

But in a grain transaction, where the seller, before the time expires for the delivery of grain sold, notifies the purchaser, that unless he places in his hands a deposit to cover a decline in the price of the grain he will sell it, and afterwards does sell it, and notifies the buyer of the fact, he thereby rescinds the contract, and cannot subsequently renew it without the concurrence of the purchaser.<sup>2</sup>

Where a pledgor of securities becomes a bankrupt after a pledge and before the redemption thereof, it has been held that such fact does not in anywise affect the rights of the pledgee to sell and transfer the securities upon the bankrupt's default. The Bankrupt Act does not take away any right secured to the pledgee by his contract,<sup>3</sup> nor is leave of the bankruptcy court necessary to sell the stock pledged.<sup>4</sup> But the mere fact that the Broker sells, without due notice to his Client of the time and place of sale, and by such act commits a conversion, does not preclude him from bringing an action against his Client to recover the debt arising out of the advance made by the Broker to purchase the stock. This point arose in *Gruman vs. Smith*,<sup>5</sup> where the action was brought by the plaintiff as the assignee of F. & Co., Stock-brokers, to recover a balance due the latter from the defendant, growing out of a stock transaction. After the stock was purchased, the defendant, besides leaving some money as a margin, deposited the stock in question with the Brokers, as collateral security. The margin having become exhausted by a sudden decline of the stock in question, the collateral was

<sup>1</sup> *Marfield vs. Goodhue*, 3 Com-stock (N. Y.), 62-73.

<sup>2</sup> *Lassen vs. Mitchell*, 41 Ill. 101.

<sup>3</sup> *Jerome vs. McCarter*, 94 U. S. 734.

<sup>4</sup> *In re Grinnell*, 9 Nat'l Bankr. Reg. 137.

<sup>5</sup> 81 N. Y. 25, rev'g 12 J. & S. 389.



sold without due notice of the time and place of sale. A technical conversion was conceded. The action was subsequently brought to recover the above balance, the defendant having been first credited with the proceeds of the sale at 90.

At the trial, the court nonsuited the plaintiff on the ground that the assignee represented the Brokers, who were the wrongdoers. The plaintiff claimed that this cause of action grew out of the original purchase of the stock in the first place, and not out of its wrongful conversion after it became a collateral.

On an appeal, the judgment below was affirmed on the ground that "the defendant was entitled to notice of the time and place of sale, and the sale of the stock with an omission to give such notice was an act of conversion on the part of the Brokers that debars their assignee from maintaining this action against defendant." But in the Court of Appeals, this judgment was reversed and a new trial ordered, on the ground that a technical conversion of the collateral did not of itself work an extinguishment of the original claim, and that the defendant was only entitled to damages actually sustained. In support of this view, *Baker vs. Drake*<sup>1</sup> and *Markham vs. Jaudon*<sup>2</sup> were cited.

But this case differs from all the others in that the action was brought by the Brokers, or a party representing them, and not by the Client whose stock was converted.

The action was not based upon the wrongful sale, but upon the debt for the advance made by the Brokers to purchase the stock. The title of the stock when purchased was in the defendant; the advance of the whole or a portion of the purchase-money created the relation of debtor and creditor; and the stock put up as security, together with any additional amount called a margin, was a pledge to secure the debt.

<sup>1</sup> 53 N. Y. 211.

<sup>2</sup> 41 id. 435.

The defendant was not bound by the sale for want of notice, and might insist upon full indemnity for his loss or injury; but such loss was not necessarily the whole amount of the plaintiff's claim.

The court, by Church, C. J., upon this latter point said: "The stock sold at 90. Suppose that was then its full value, and it had gone down to 50 and remained there, it is very clear that, so far from being injured, the defendant would have been benefited by the sale. The defendant cannot claim a greater benefit than would have been derived if the act complained of had not been committed. The defendant might have shown that the market value of the stock at the time of the sale exceeded the price for which it was sold, and he was entitled to a reasonable time after notice of the sale to replace the stock; and if in the meantime it had advanced in price, the defendant would have been entitled to the difference. Beyond this, he was not legally injured."<sup>1</sup> So when Stock-brokers are sued for illegally converting plaintiff's stocks, they may interpose a counter-claim for the deficiency on such sale.<sup>2</sup> And these propositions were again confirmed by the N. Y. Court of Appeals in October, 1881.<sup>3</sup> In that case the plaintiffs, who were Brokers and copartners, brought an action to recover an amount claimed to be due upon an alleged agreement as to the sale and purchase of stocks on defendants' joint account. It appeared that plaintiffs purchased for defendant T. 56,650 shares of a certain stock. The referee, in stating the account between the parties, credited plaintiffs with 24,200 shares sold by them, and excluded from such account 32,450 shares, although he found that plaintiffs had bought and paid for the latter on account of the defendant T.

<sup>1</sup> 81 N. Y. 25.

<sup>3</sup> Capron vs. Thompson, 13 N. Y.

<sup>2</sup> Wicks vs. Hatch, 62 id. 535. To same effect, Work vs. Bennett, 70 Pa. St. 484.

*Weekly Dig.* 199.

As to them, he also found that on April, 20, 1874, they were not in the possession of plaintiffs, but prior to that time had been pledged by them for a loan of money for their use, and had never been tendered to T. and the amount due thereon demanded. He found, as conclusions of law, that plaintiffs could not recover for the purchase of said 32,450 shares, unless they showed performance of a contract on their part. He also found that the pledge of the stocks, and suffering them to be sold by the pledgee, was not such a performance; and that defendants were not bound to redeem the stock so pledged, and plaintiffs could not recover for the purchase of such stock. Plaintiffs claimed that their pledge of the stock was not a failure to perform a condition precedent, but a breach of a condition subsequent, which is to be compensated in this action by a recoupment or counter-claim of the damages. Held, that the finding of the referee was erroneous; that the purchase of the stock was upon T.'s account, and was a proper charge against him; and the sale of the stock was a failure to perform a subsequent duty, and no condition precedent was broken which prevented plaintiffs from charging T. for the purchase of the stock.

And where a minor has employed a Stock-broker to buy stock for him, and, on coming of age, has repudiated the transaction, and retracted the authority given to the Broker, a sale of the stock bought by the latter, without notice or demand of payment on the Client, is a tortious conversion of the stock; and in an action by the Broker for the loss on the stock, under such circumstances the Client is entitled to recover, under a counter-claim, the amount deposited by him with the Broker to cover margins.<sup>1</sup>

<sup>1</sup> *Heath vs. Mahoney*, 24 Hun (N. Y.), 341; s. c. reported more fully, 12 N. Y. *Weekly Dig.* 404. A Broker commissioned to buy corn did so, but, finding the price rapidly going down, sold it for his own protection; and, on the refusal of his principal to ratify the sale, replaced it, and

This right to notice of sale, however, may be waived, either expressly or by implication; or, where there has been no notice, or an insufficient notice, the proceedings thereunder may be confirmed or ratified by the acts of the pledgor.<sup>1</sup>

In *Stenton vs. Jerome*,<sup>2</sup> the question arose as to how far a conversion of the Client's stocks may be waived by a subsequent payment of an apparent balance of account to the Brokers. There the Brokers had committed a conversion by an unauthorized sale of stocks, without a previous demand of margin. This wrongful sale was made on the 11th of January, 1866, and a notification of it sent to the Client. On the 14th of January the Brokers made up the account, showing a small balance due them, and leaving in their hands as security for such balance certain United States bonds. Subsequently the Client called and complained of the manner in which she had been treated. The Brokers having written several letters stating that unless the balance was paid they would sell her bonds, she finally, being in ill-health, and her husband having met with a serious accident needing her attention, and having pressing need for her bonds, wrote to her Brokers informing them of these facts, and sent therewith the balance of account; thereupon the Brokers delivered the United States bonds to her messenger. She subsequently brought an action to recover damages for the unlawful con-

tendered the elevator receipts. The principal refused to receive them, and the Broker sold the corn. Both sales were made at a loss, and the Broker sued his principal for damages. Held, that in estimating damages the first sale was immaterial (*Gregory vs. Wendell*, 40 Mich. 432).

<sup>1</sup> *Sparhawk vs. Drexel*, 12 Nat'l Bankr. Reg. 450; *Gruman vs. Smith*, 81 N. Y. 25, rev'g 12 J. & S. 389; *Stenton vs. Jerome*, 54 N. Y. 480; *Milliken vs. Dehon*, 27 id. 364; *Child*

*vs. Hugg*, 41 Cal. 519; *Bryson vs. Rayner*, 25 Md. 424; *Hyatt vs. Argenti*, 3 Cal. 151; *Loomis vs. Stave*, 72 Ill. 623; *Md. Fire Ins. Co. vs. Dalrymple*, 25 Md. 242-264; *Colket vs. Ellis*, 10 Phila. 375; s. c. 32 Leg. Int. 82; *Baltimore Marine Ins. Co. vs. Dalrymple*, 25 Md. 269; *Hamilton vs. State Bank*, 22 Ia. 306; *Clark vs. Bouvain*, 20 La. Ann. 70; *Searing vs. Butler*, 69 Ill. 575. But see *Kenfield vs. Latham*, 2 Cal. Leg. Rec. 235.

<sup>2</sup> 54 N. Y. 480.

version of her stocks. The court of ultimate resort, affirming the judgments of the lower tribunals, held that the action of the Client in accepting the account did not constitute an account stated between the parties; and that her subsequent payment of the balance for the purpose of obtaining her bonds was not voluntary, but compulsory, constituting a duress of goods. One of the learned judges held that an action could have been sustained to recover back the balance paid to the Brokers; and that inasmuch as the present action was one of conversion, it, having once vested, could only be discharged by release under seal or the receipt of something in satisfaction.<sup>1</sup>

But where a sale of mining stocks was made without notifying the pledgor to make his margin good, and without sufficient notice of time and place of sale, still, if the pledgor knew of the time and place and made no objection, and, after the sale, he was presented with an account in which he was credited the amount received at the sale, and he admits the correctness of the same, approves of the sale, and promises to pay the balance claimed—these facts are sufficient to show a ratification of the illegal sale, and the court will not disturb the same.<sup>2</sup>

But where the notice of sale was dispensed with, but demand for payment of the debt was not, it was held that the Broker who sold his Client's stock without notice and without demand was guilty of a conversion of the stock, and was liable in damages.<sup>3</sup>

Where, however, there has been a waiver of demand, or of notice of time and place of sale, there is still an obligation resting upon the pledgee to act with entire good faith, and to sell the securities for the highest price that he can obtain.<sup>4</sup>

<sup>1</sup> To same effect, see *Clarke vs. Meigs*, 10 Bosw. (N. Y.) 337; s. c. 22 How. Pr. 340.

<sup>2</sup> *Child vs. Hugg*, 41 Cal. 519.

<sup>3</sup> *Kenfield vs. Latham*, *supra*.

<sup>4</sup> *Sparhawk vs. Drexel*, 12 Nat'l Bankr. Reg. 450, at 471 and 472; *Genet vs. Howland*, 45 Barb. (N. Y.) 560;

*(d.) Place of Sale.*

The preliminary steps having been properly taken, the next inquiry is as to the *place* where the sale should be made. In the case of an ordinary dealing in stocks, where a Client orders his Broker to buy or sell, the place where the purchases or sales are to be made is at the Stock Exchange, unless the Broker is otherwise directed. That is the place where transactions of this description are customarily made, and, by employing a Stock-broker, the Client impliedly authorizes him to perform the business in the manner and at the place established by local usage.<sup>1</sup> And, on the other hand, the Broker, in his dealings for his Client, is likewise restricted by usage, and he violates his instructions by buying or selling in any other manner or place than that which usage justifies.<sup>2</sup>

But what is more particularly intended in this connection is to ascertain the proper place for buying or selling the stocks where the Client is in default of margins after proper demand and notice, or where the Broker desires to close the transaction and the Client refuses to "buy in" or receive the stocks which are being "carried" for his account, or to authorize the Broker to do so.

In the first place, where the Client is "short" of stocks, and by a rise in the price his margin is exhausted, it would seem to be reasonable that the Broker, after due demand and notice, should be at liberty to "buy in" the stocks and close the transaction at the Stock Exchange. The very nature of a "short" sale requires that the Broker should make the purchase at the Exchange, which is always open, and where stocks may be bought at any time during the regular hours of business. It would be absurdly incongruous to hold that where,

Fitzgerald vs. Blocher, 32 Ark. 742;  
and cases just cited, ante, p. 204.

<sup>1</sup> Rosenstock vs. Tormey, 32 Md. 169.

<sup>2</sup> Id.; see also title "Usages."

on a short sale, the Client was in default, the Broker should be required to make the purchase of the stock at public auction. The Broker would have no power to compel a public auction to be held, or to force any one to put up the kind and amount of stocks which he desired to buy. There would therefore seem to be no room for doubt that the Broker, in such a case, could make the purchase at the Exchange.<sup>1</sup>

But a different and more difficult question arises in a case where a Client is "long" of stocks and the Broker is carrying them for his account. In this event, as has been observed, the Broker occupies the relation of a pledgee to his Client, and upon failure of the latter to supply proper margins to meet the fluctuations of the market he may, after proper notice to the Client, as we have seen, sell the same. Where? Is the answer to be determined in precisely the same manner as if the case were one of pure pledge, as, for instance, where money is advanced upon the security of personal property and the pledgor refuses to redeem it? Or, will the courts take into consideration the important element of usage, and hold that a sale made at the Exchange is binding upon the Client? The general principle is, that the pledgee of stocks must sell the same at public auction.<sup>2</sup>

The rule confining the place of sale to a public auction is very old and uniform. The theory of the law is, that the sale should be made at some place where all the parties interested may have an opportunity to attend and see that it is fairly conducted; that the pledgor may exert himself in procuring buyers, and thus enhance the price, and give him the right to redeem the pledge at any moment before the sale should be

<sup>1</sup> See authorities cited ante, under *Wheeler vs. Newbould*, 16 id. 392; § VI., appertaining to a short sale, *Edwards on Bailm.* § 283; *Schouler* especially *Knowlton vs. Fitch*, 52 N. on Bailm. 209; *Tyler on Usury*, etc. Y. 288. 585 et seq.

<sup>2</sup> *Milliken vs. Dehon*, 27 N. Y. 364;

actually made.<sup>1</sup> And, in the absence of express agreement authorizing a different mode, there are cases that undoubtedly hold that mere local usage to sell at private sale cannot be allowed to modify this right of the pledgor.<sup>2</sup> In furtherance of this general rule, the courts have repeatedly held that a sale of pledged stocks cannot be made at the Board of Brokers in New York city, unless there was a stipulation to that effect, for the reason that by the regulations of the Board the sales are essentially private, no one being allowed to enter the room but members.<sup>3</sup>

It will be observed that, in all of the cases just cited, the relation of pledgor and pledgee existed between the parties, *but that such relation did not grow out of speculations in stocks upon margins*, save in the case of *Brass vs. Worth*. In that case, however, the Brokers had sold the Client's stock without any notice to him that his margins had become exhausted, and the court said, "The defendants claim the right to sell the property pledged without notice to or knowledge of the pledgor the moment prices sank so that the collaterals deposited are no longer equal to the margin of the five per cent. stipulated in the contract;" and that this fact, coupled with the sale being made at the Board of Brokers, a place that the court held was private, rendered the transaction nugatory.

But the grounds upon which these decisions are based, holding that a sale at the Stock Exchange, in the absence of express agreement, is invalid, will, we think, when carefully examined, be found faulty and untenable at the present day. In the first place, a sale at the Stock Exchange is not in any broad

<sup>1</sup> *Id.*

<sup>2</sup> *Brown vs. Ward*, 3 Duer, 660; § 283, and cases cited in notes 2 and 3; *Wheeler vs. Newbould*, 16 N. Y. 392; 3.

*Story on Bailm.* (9th ed.) § 310, note 3; but compare *Dykers vs. Allen*, 7 Hill, 497; *Castello vs. City Bank*, 1 N. Y. *Leg. Obs.* 25, and other cases cited. *Edwards on Bailm.* 103; *Brass vs. Worth*, 40 *id.* 648.

<sup>3</sup> *Id.*; *Wood vs. Hamilton*, cited in *Castello vs. City Bank*, *supra*; *Rankin vs. McCullough*, 12 Barb. (N. Y.)



sense made *privately*; it is in almost every respect a public sale. While it is true that the Stock Exchange is, to a certain extent, a private organization, from which all persons are sedulously excluded who are not members, yet it is the great mart for disposing of and establishing the prices of stocks; and in no public exchange could they be sold to better advantage. And although strangers are not allowed to attend and bid, they can always be represented by Brokers of their own choosing, who will carry out the wishes of their principals.

In *Sparhawk vs. Drexel*,<sup>1</sup> Cadwalader, J., in overruling an objection to a sale made at the Stock Exchange, says: "As to the mode, I am not aware of any reason that the sales should have been by auction. On the contrary, I think that, considering the nature of the securities, this would not have been an advantageous mode of disposing of them, if there was a fair market for them at the Stock Exchange, or Brokers' Board, where the ruling prices ordinarily fix the standard value, from time to time, of such securities. If the times of sale were proper, this mode was unobjectionable." In that case, however, there was an express authority to sell at public or private sale.

It seems almost absurd to call a great mart like the Stock Exchange a private place, in face of the patent fact that all prices are established there; yet, as has been seen, the above cases hold that, in the absence of an agreement giving the pledgee a right to sell privately, a sale at the Board of Brokers does not answer the requirements of the general law of pledges, requiring a sale of the pledge to be at public auction. In the second place, the closing of a speculative transaction in stocks is different from that of an ordinary pledge. The parties to a stock speculation intend that the transaction shall be carried on and consummated at the Stock Exchange; in-

<sup>1</sup> 12 Nat'l Bankr. Reg. 450, at 470.

deed, there is no other place where such a speculation can be engaged in. It is, therefore, but reasonable that the Broker should be allowed, after giving all necessary preliminary notices, to close the transaction by a sale of the stocks at the Stock Exchange, and the introduction of the usages of Stock-brokers might go very far towards effecting this result.

This was the view adopted by the Court of Appeals of Maryland as early as 1866,<sup>1</sup> after a review of the New York cases holding to the contrary. The court said: “. . . Considering the requirements of the law, and the reason and nature of the transaction, we are of the opinion that the most proper and suitable place for a sale of stock is at the Board of Brokers. There is the Stock Market—the mart to which vendors and purchasers resort, by their agents, to buy and sell stock, where competition among bidders is most apt to be found. Such sales are public; and unless there be, in the particular case, some ground for impeaching their fairness, we are of opinion they are reasonable and ought to be supported.” And this doctrine was afterwards expressly confirmed by the same court.<sup>2</sup>

And it has been held<sup>3</sup> that where a pledgor is notified that a sale of his stocks will be made at the Board of Brokers, if he is dissatisfied with the place of sale he must promptly dissent, or his silence will be understood as an acquiescence. In *Dykens vs. Allen*,<sup>4</sup> however, the Supreme Court of New York held that where authority was given to sell stock at the Board of Brokers the sale must be openly made. The court, upon this point, said: “The authority to sell the stock in question at the Board of Brokers for the payment of the

<sup>1</sup> *Md. Fire Ins. Co. vs. Dalrymple*, 25 Md. 242–265. by *Markham vs. Jaudon*, 41 N. Y. 235; and the question was raised, but not decided, in *Child vs. Hugg*, 41 Cal. 519.

<sup>2</sup> *Rosenstock vs. Tormey*, 32 Md. 169; see also in this connection *Schepeler vs. Eisner*, 3 Daly (N. Y.), 11, (N. Y.), 389.

which, however, is in effect overruled <sup>3</sup> *Willoughby vs. Comstock*, 3 Hill (N. Y.), 497.

debt, if such debt was not paid when it became due, did not authorize the pledgees, even if they had retained the stock in their own hands, to put *the same up secretly*. But they should have put up the stock openly, and offered it for sale to the highest bidder at the Board of Brokers, stating that it was stock which had been pledged for the security of this debt, and with authority to sell it at the Board of Brokers if the debt was not paid. In this way only the stock would be likely to bring its fair market value at the time it was offered for sale. And in this way alone could it be known that it was honestly and fairly sold, and that it was not purchased in for the benefit of the pledgees by some secret understanding between them and the purchasers."

Altogether, the law upon this subject is in a very unsatisfactory condition; and if the remarks just quoted are accepted as correct, it is rendered even more uncertain. But we believe that the rule is otherwise, and that an authority to sell at the Board of Brokers includes the power to sell in accordance with the ways and manner in which sales are ordinarily conducted at that place.

A statement preceding the sale, that the stocks were being sold to close a transaction, as indicated above, would not enhance the price of the same, and would be of no conceivable benefit to the pledgor.<sup>1</sup> Upon the whole, we are inclined to think that, taking into consideration the character of a speculative transaction in securities on margin, the courts would uphold a sale at the Stock Exchange for the reasons heretofore advanced. Where several different kinds of stock are pledged as security for different loans, a judgment directing a sale in gross of all the stocks is erroneous. Unless the several stocks are pledged as security for the same debt, it is

<sup>1</sup> See, as generally sustaining the N. Y. 535; *Ogden vs. Lathrop*, 65 id. above views, *Wicks vs. Hatch*, 62 158; *Quincey vs. White*, 63 id. 370.

not proper to apply the proceeds to the payment of the entire indebtedness.<sup>1</sup>

The doctrine of waiver may exercise a very important influence on all the questions heretofore discussed; because it has been held, in a number of cases, that the pledgor may waive his right not only to a notice of sale, but as to the manner and place where the sale should be made. This waiver, moreover, need not be expressly entered into by the pledgor, but it may be inferred by the court from the nature of the transaction, or the surrounding circumstances thereof.<sup>2</sup> And the pledgor may waive his rights to object to the informality of the proceedings of the sale of the pledged article by conduct on his part amounting to a ratification.<sup>3</sup> So acquiescence by a principal in the wrongful acts of his agents, to amount to a ratification, must have been continued for some length of time, and the principal must have been cognizant of his rights.<sup>4</sup> A principal, however, is not necessarily to be deemed to have ratified a wrongful act of his agent so as to exempt the agent from liability to him, merely because he does not notify to the agent his dissent at the earliest possible opportunity after being informed of the wrongful act.<sup>5</sup> But the ratification may be inferred from circumstances, as where the agent exceeds his authority a subsequent assent may be inferred, and the law will consider it as equivalent to an express ratification.<sup>6</sup>

<sup>1</sup> Mahoney vs. Caperton, 15 Cal. 313.

<sup>2</sup> See cases heretofore cited, p. 204. Bryson vs. Rayner, 25 Md. 424; Hyatt vs. Argenti, 3 Cal. 151; Loomis vs. Stave, 72 Ill. 623; Md. Fire Ins. Co. vs. Dalrymple, 25 Md. 242, 264; Baltimore Marine Ins. Co. vs. Dalrymple, id. 269; Colket vs. Ellis, 10 Phila. 375; s. c. 32 Leg. Int. 82.

<sup>3</sup> Hamilton vs. State Bank, 22 Iowa, 306; Child vs. Hugg, 41 Cal. 519;

Clark vs. Bouvain, 20 La. Ann 70.

<sup>4</sup> Brass vs. Worth, 40 Barb. (N. Y.) 648.

<sup>5</sup> Clarke vs. Meigs, 10 Bosw. (N. Y.) 338.

<sup>6</sup> Searing vs. Butler, 69 Ill. 575. As to what will constitute an admission and ratification of the acts of a Stock-broker in a series of stock speculations, see Saltus vs. Genin, 3 Bosw. (N. Y.) 250.

(e.) *Broker Cannot Sell or Purchase.*

The general rule of law which governs the relation of principal and agent is applicable to that existing between a Stockbroker and his Client; and it is well settled that an agent cannot, without the knowledge and consent of his principal, either sell to or buy from the latter.

The principle is based upon the obvious reason, that the position of an agent being one of trust and confidence, many frauds and undue advantages would creep in if the law sanctioned his dealing with his principal in his own behalf. Such a transaction is therefore considered a breach of the agent's duty, and the contract is subject to rescission, irrespective of any question of intentional fraud or actual injury.<sup>1</sup>

The law rejects indiscriminately all transactions, whether purchases from or sales to the agent, and whether there is any evidence or intention of fraud or not. The mere fact of a purchase by an agent from his principal, without the knowledge of the latter, *ipso facto* vitiates the transaction. Hence it would seem that although the agent paid the full market value for the article in question, and that no higher price could be obtained, yet there is no answer in the mouth of the agent to an action to set the transaction aside.

But how far should this rule be followed in a case where the stocks are sold or purchased by the Broker at the Ex-

<sup>1</sup> Conkey vs. Bond, 36 N. Y. 427; Marye vs. Strouse, 5 Fed. Reporter, Taussig vs. Hart, 49 id. 301; also 483; Gillett vs. Peppercorne, 3 Beav. s. c. 58 id. 425; Pickering vs. De- 78; Kimber vs. Barber, L. R. 8 Ch. merriitt, 100 Mass. 416; Day vs. App. 56; Bentley vs. Craven, 18 Holmes, 103 id. 306; Quincey vs. Beav. 76; Trevelyan vs. Charles, 9 White, 63 N. Y. 370; Robinson vs. id. 140; Dunne vs. English, L. R. 18 Mollett, L. R. 7 H. L. Eng. & I. App. Eq. 524; Commonw. vs. Cooper, 15 Cas. 802; Brookman vs. Rothschild, Am. Law Rev. 360. Nor can he sell to a firm of which he is a member (n. s.) 165; 2 Dow. & Cl. 188; Crull (Martin vs. Moulton, 8 N. H. 504); vs. Dodson, Macn. Sel. Cas. 114; 4th Kent's Comm. (7th ed.) 475.

change? Suppose A., who has 100 shares of stock in the office of a Broker, directs the latter to sell the same; can the Broker himself purchase the stock at the Board of Brokers at the market price? Or suppose the Broker is directed to sell the stock, and by another Client is directed to buy the same kind of stock; can the Broker legally execute both of the orders by a simple transfer through his books at the market price? We should answer both these questions negatively; for, while the Broker might show that his principal was just as much benefited as if a third person had bought the stock, yet the opportunity for fraud would be obviously too great to establish any other rule. The Broker, knowing the temper of the market, might sell his Client's stock when the prices were lowest, so as to buy cheaply for himself. Or he might sell the stocks when the market would not take so many shares without a great sacrifice of the real price. Altogether, the reasons seem to be too strong to authorize a departure from the general rule, even where the sale or purchase takes place at the Open Board.

In the State of New York these views have received confirmation in the case of *Taussig vs. Hart*,<sup>1</sup> where Brokers trading in stocks on a margin for a Client had made, among other transactions, a purchase for the latter of 100 shares of *Pacific Mail*, which they had subsequently transferred from defendant to themselves, reporting to him the existing market price and crediting him therefor. The court held that the Client had the right to treat the sale of this stock by the Brokers to themselves as void, and to demand an actual sale of the stock, in which event he would incur the risk of any loss arising from its depreciation, and be entitled to the benefit of any rise, or he could elect to affirm the sale and hold the Brokers to the price which they had reported; but he

<sup>1</sup> 49 N. Y. 301.

could not do both. If the Brokers, after taking the stock to their own account, sold it at an advance, the Client could charge them with any profit realized by them from the transaction, or he might treat them as having converted the stock to their own use, and charge them with damages for the conversion ; but he could not charge the Brokers with the price or value of the stock, either as purchasers or as having converted it, and at the same time claim that the stock is undisposed of, and the account for that reason not closed.

The rule we are considering was likewise most impressively laid down by the House of Lords in the year 1829 in the case of *Brookman vs. Rothschild*.<sup>1</sup> This case arose out of a transaction with the well-known banking house of Rothschild. It appeared that the plaintiff was a holder of 20,000 French rentes. The defendant resided in London, and dealt largely in foreign securities, and had contracted for the Prussian loan ; he was also a partner with his brothers in the Paris firm. The plaintiff employed the defendant to sell his rentes. The defendant, without the plaintiff's knowledge, purchased them for himself and his partners, but gave the plaintiff the market price. The plaintiff then purchased Prussian bonds of the defendant, and agreed that they should remain in his hands as a security for the purchase-money, which remained unpaid, but no bonds were appropriated or set apart for the plaintiff. The defendant, however, had always in his hands bonds to a greater amount. Subsequently defendant was directed to sell the bonds ; and he informed the plaintiff that he had sold them accordingly, and gave the plaintiff credit for the alleged price. The plaintiff then purchased 115,000 rentes of the defendant, which he was to pay for on a future day, and the rentes were then to be transferred to him ; but no rentes were set apart for the plaintiff or identified as belonging to him.

<sup>1</sup> 3 Sim. 153 ; *aff'd* in H. L., 5 Bligh, 165.

Before the day of payment arrived, the defendant, by the plaintiff's desire, sent an order to his partners to sell the rentes; and they subsequently informed the plaintiff that they had sold them accordingly, and gave the plaintiff credit for the alleged proceeds. The accounts between the plaintiff and defendant were afterwards settled, and the plaintiff paid the balance which appeared due from him to the defendant. Four years afterwards, the plaintiff having discovered that the 20,000 rentes had been purchased by the defendant and his partners, and that there was no appropriation on the two after-purchases, filed his bill to have all the transactions set aside. The vice-chancellor, in an elaborate opinion, sustained the plaintiff's claim, and set the transaction aside. Upon appeal to the House of Lords, this decree was unanimously sustained without hearing the respondents. Lord Wynford, who delivered an opinion of great force, but which is extraordinary in its opening, said: ". . . I am very sorry to say that, with respect to one of the parties in this case, it is perfectly clear that he is a most desperate gambler in the funds, and he has met with that fate which most of those meet with who become such gamblers; for I believe, whenever a man puts his foot into the Stock Exchange, not being a member of that Stock Exchange, his ruin is certain, and the only question is a question of time." He then proceeds with his opinion, some extracts from which vividly illustrate the subject upon which we are treating. "It has been said at the bar, that if a man in the country sends to his Broker in London, and desires him to sell stock for him, the Broker in London may take that stock for himself, and charge him with the day's price on it. If Brokers in London do this, I have no doubt they do it fairly; but I will take leave to say that Brokers in London are not to be trusted in these things any more than any other description of agents. If I live in Dorsetshire, and I write to my



Broker in London to sell my stock, I fancy that I have the advantage of that Broker's assistance as to the day on which it is proper to sell. I fancy that, living in London, he has a knowledge of the facts which will act on the market. If the Broker in London, instead of going to the Stock Market, or instead of exercising a discretion as to the period when he should sell any stock, is to take that stock to himself, he deprives me of the security I have and the confidence I repose in his skill and intelligence; and if there is a loss to me, he is the person who takes advantage of that loss. I take it to be a general principle of law and equity that a man cannot be a seller for me and a buyer of that property himself."<sup>1</sup> This principle is also forcibly illustrated by the case of *Gillett vs. Peppercorne*.<sup>2</sup> There the defendant, a Stock-broker, was largely interested in the shares of a water-works company, of which he was also an active director. Having recommended the plaintiff to make investments therein, the plaintiff in May, 1826, December, 1830, and January, 1831, respectively, purchased through the defendant twenty-five shares in the company, which shares were transferred to the plaintiff by certain persons who held them as trustees for the defendant, and who so held them simply to enable the defendant to make a transfer of the shares through third parties. Some of the shares had, after their purchase, been transferred by the plaintiff to his sons by way of advancement; but they were retransferred the day previous to the institution of the suit. The plaintiff made the discovery of the real nature of the transaction in 1837; and in 1838 he filed his bill to set aside the transaction on the ground that it was not competent for a Stock-broker, or agent employed to purchase, to sell his own shares to his principal in the name of another

<sup>1</sup> See also *Crull vs. Dodson*, Macn. Sel. Cas. 114.      <sup>2</sup> 3 Beav. 78.

party. The court so held. The court found that in one of the transactions the defendant acted as a gratuitous agent of the plaintiff, but held that this made no difference, and that the same principle would apply; and it refused to countenance such a transaction because it was said to be an every-day practice among Brokers. The court, in its opinion, said that the plaintiff might say, "Put me in the situation in which I was before. Whether these shares were of greater value or not, I do not choose to be at the risk of selling the shares which now stand in my name. They have been transferred to me in a manner which the law does not warrant, and I desire to be placed in the situation in which I should have been if the transaction had not taken place." The court directed that the defendant should take back the shares, with all the dividends which had been paid upon them; and he ought to pay to the plaintiff the purchase-money, with interest, and the costs of the suit. In regard to the question of laches in discovering the fraud and bringing the suit, the court said: "It is not sufficient to say that the plaintiff, being a proprietor, might have gone to the books and made a search, and found out all these matters, or that the son, being a director, and having the books before him, might have made the search; the knowledge, in my opinion, ought to have been brought home to the plaintiff—and this has not been done." The court also held that the transfer of the shares made previous to the suit did not affect the plaintiff's right of action.

When the case of *Taussig vs. Hart*,<sup>1</sup> before referred to, came before the Court of Appeals of New York for a second time, the court reiterated the doctrine that, upon an order by a Client to buy stock, the Broker could not deliver his own, "for the reason that the law does not permit an agent employed to purchase to buy of himself. It is no reason that

<sup>1</sup> 58 N. Y. 425.

the intention was honest, and that the Brokers did better for their principal by selling him their own stock than they could have done by going into the open market. The rule is inflexible, and although its violation in the particular case caused no damage to the principal, he cannot be compelled to adopt the purchase."

And the case of *Robinson vs. Mollett*<sup>1</sup> carries the principle still further, by establishing the rule that not even a local custom of Brokers will sanction a Broker in selling his own goods to his principal, without the knowledge and consent of the latter.

In that case, plaintiff, a merchant in Liverpool, gave orders to a tallow Broker in London to buy certain quantities of tallow for him. The Broker did not buy the specified quantities from any person, though he sent bought notes in the usual form—"Bought of A. on your account;" but, both before and after the order, he bought from various persons in his own name larger quantities of tallow, proposing to allot to plaintiff the quantities he had desired to be bought. On plaintiff's refusal to accept, the Broker sold the tallow and brought an action for the difference. This case was very elaborately argued by counsel and decided upon several different opinions, the judges being unanimous, except one, that the suit could not be maintained; and although the evidence showed such a mode of dealing to be the usage in the London tallow market, it appearing that the principal had no knowledge of it; that the mere fact of employing a Broker to execute a commission as a Broker in a market where such usage prevails would not make the principal liable; and that mere usage, without express knowledge and assent, could not be admitted to convert a Broker employed to buy for his employer into a principal to sell for him. Quoting the language of Willes, J.,

<sup>1</sup> L. R. 7 H. L. Eng. & I. App. Cas. 802.

below, Mr. Justice Mellor said that "it is an axiom of the law of principal and agent that a Broker employed to sell cannot himself become the buyer, nor can a Broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper; a different rule would give the Broker an interest against his duty."

So in Massachusetts it has been held<sup>1</sup> that an order of the Client to a Broker, to buy stock deliverable at the buyer's option in 60 days, does not authorize the Broker to buy the stock himself at 30 days, and deliver it to his Client at the end of 60 days at an increased price and interest, besides the usual commission, and a usage of Brokers to do so is bad; nor is the exchange of bought and sold notes between Broker and his Client, nor the giving of his note to his Broker in payment for the stock, in ignorance of the Broker's conduct, a ratification of his acts.<sup>2</sup>

When a person gives an order to a Stock-broker "to buy stocks on margin," he employs the Broker to act for him and in his interest; accordingly the Broker has no right to put himself in a position antagonistic to the interests of his employer; he cannot make himself both buyer and seller, and any custom to this effect, unknown to the employer, is against public policy and illegal.<sup>3</sup>

And in the recent case of *Marye vs. Strouse*, the same rule was laid down by the Circuit Court of the United States in Nevada.<sup>4</sup> There mining-stock Brokers were ordered by their Client to purchase 500 shares of a certain mining stock at the

<sup>1</sup> *Day vs. Holmes*, 103 Mass. 306.

<sup>2</sup> To same effect, *Pickering vs. Demeritt*, 100 id. 416.

<sup>3</sup> *Commonw. vs. Cooper*, 15 Am. Law Rev. 360; s. c. 15 Mass. Law Rep. No. 24, May 4, 1881. And the burden of proof lies on the agent to

show that he has made a full disclosure to his principal; but his simple, uncorroborated evidence to that effect will not avail where it is contradicted by his principal (*Dunne vs. English*, L. R. 18 Eq. 524).

<sup>4</sup> 5 Fed. Rep. 483.

San Francisco Mining-stock Board. They purchased 125 shares at the latter place; and at the same time F., one of the members of the firm of Brokers, turned over to his firm 375 shares for the purpose of filling the Client's order. The Client never received the stock into his possession, never assented to this mode of filling his order, and had no knowledge of it until the time of bringing a suit against him to recover the amount thereof.

The court held that he was not chargeable with the amount of the 375 shares. The court said: "It is not claimed that there was any fraud in fact here, but evidence establishing the transfer of the stock to have been *bona fide* and for a fair price is unavailing. The inquiry does not reach the question whether there was or was not fraud in fact." The court cited among other cases the decision of the Supreme Court of the United States in *Michoud vs. Girod*,<sup>1</sup> and further decided, that the mere fact that there was an account stated between the parties subsequent to the transaction did not alter the rule, in the absence of knowledge on the part of the Client. Finally, where a Client has dealt with his Broker several times as a principal in stock transactions, it does not annul his character as Broker, or deprive the Client of the protection which the law extends to him by reason of the relation which exists between him as principal and the Broker as such.<sup>2</sup>

If there is any principle of law that is well settled, it seems to be the one which we are considering, and we do not deem it within the purpose of this work to refer to any cases upon the subject other than those in which Stock-brokers have been involved; although the principle is framed so comprehensively as to embrace every relation

<sup>1</sup> 4 How. (U. S.) 503.

<sup>2</sup> *Bragg vs. Meyer*, 1 McAll. (C. C.) 408, 417.

in which the slightest element of trust or confidence exists.<sup>1</sup>

The solicitude with which the law of England has watched over the rights of Clients to protect them from any misplaced confidence or frauds on the part of Brokers is very apparent from a perusal of the act passed in the reign of Queen Anne,<sup>2</sup> and the subsequent acts amendatory thereof, passed in the reigns of George II. and III., and in the reign of her present Majesty.<sup>3</sup>

By the first of these acts, Brokers were compelled to become licensed, and the jurisdiction over them was placed in the hands of the court of the Mayor and Aldermen of London, and they were required to enter into a bond and take an oath of office. The form of this bond and oath is fully given in the case of *Green vs. Weaver*;<sup>4</sup> and from a perusal of the bond it appears that one of its conditions is that the Broker shall not deal in the commodity as principal in which he deals as Broker.

In one case,<sup>5</sup> Lord Eldon said: "If a Broker of the city of London trades for himself openly and publicly, he does that which the policy of every legislative enactment meant to prohibit. If he mixes in a transaction in which he is ostensibly the Broker, but really a buyer or seller, this is a gross fraud."

And in *Proctor vs. Brain*,<sup>6</sup> Best, C. J., used the following significant language: "A man who is a sworn Broker cannot be a principal, and this is for the wisest reasons. . . . I am satisfied that no body of men will rejoice more in see-

<sup>1</sup> Nor can a Broker who is directed to purchase bonds sell them to his Client at a higher price (*Levy vs. Loeb*, N. Y. Ct. of App. 1881, not yet reported).

<sup>2</sup> 6 Anne, c. 16.

<sup>3</sup> 7 Geo. II. c. 8, § 9; 57 id. III. c. 60; and 33 & 34 Vict. c. 607.

<sup>4</sup> 1 Sim. 404 & 424; s. c. 6 L. J. Ch. 1. See form of bond and oath given post, p. 243. *Kemble vs. Atkins*, 1 Holt, 427, 431, note; *Clark vs. Powell*, 1 Nev. & Man. 492, 504.

<sup>5</sup> Ex parte Dyster, 1 Mer. 155, 175.

<sup>6</sup> 2 Moo. & P. 284; 3 C. & P. 536.

ing the regulations enforced than the Brokers themselves. If I employ a Broker, I pay him for his assistance, and I suppose that I have the benefit of his judgment; I suppose that he is acting honestly; but what security have I if a man is to shift his character at pleasure from that of Broker to principal?"<sup>1</sup>

There seems to be an exception to the principle above stated, which was made for the first time by the Court of Appeals of the State of New York in the case of *Quincey vs. White*.<sup>2</sup> It was there held that where stocks were sold at the Board of Brokers "under the rule"<sup>3</sup> by a Broker who had loaned money on them to a fellow-Broker, the proceeding was in the nature of a foreclosure, and the creditor might himself become the purchaser. The court said: "It must be assumed that a person selling stock under the rule (as it is called) has a right to purchase himself. The object is to foreclose the claim of the mortgagor or pledgor, and, in analogy to other similar cases, the pledgee or mortgagee may become the purchaser." And the rule seems to be settled, that a Broker or pledgee may become the purchaser of the pledged security at a judicial sale held under a decree to foreclose the pledge.<sup>4</sup>

Courts of equity do not, however, go so far as to prevent an agent dealing with his principal in all cases. They only require that he shall deal with him at "arm's-length," and after a full disclosure of all he knows with respect to the property.<sup>5</sup>

<sup>1</sup> See also remarks of Lord Ellenborough in *London, etc., vs. Brandon*, Holt, 438, note; see also cases cited under the next subdivision (*h*), and report of Royal Stock Exchange Commission, July, 1878.

<sup>2</sup> 63 N. Y. 370-376.

<sup>3</sup> Art. XVIII. § I. By-laws N. Y. Stock Exchange.

<sup>4</sup> *Quincey vs. White*, 63 N. Y. 370-376; *Jones on Mort.* § 1636; *Newport, etc., Bridge Co. vs. Douglass*, 12 Bush (Ky.), 673, 720.

<sup>5</sup> *Evans on Ag.* 14; *Trevelyan vs. Charter*, 9 Beav. 140.

And where the Broker buys or sells his own stock on his Client's account, and thereby makes a profit, his principal may either repudiate the transaction altogether, or he may adopt it, and claim for himself the benefit made by his agent.<sup>1</sup>

*(f.) Effect of Sale or Purchase by Broker.*

The effect of a purchase by a Broker or pledgee of the stocks of the Client or pledgor, as we have seen, is to render the transaction void, and the cases hold that such a purchase does not change the creditor's relation to his debtor, but that the securities are still held by the creditor under the original titles as security for the original debt. The transaction is treated precisely as if no sale had been made; and the debtor, in order to obtain another sale of the securities, or to redeem them, is not required to prove that the Broker or pledgee made a fraudulent sale or one advantageous to himself, but only that he became the purchaser. The Broker or pledgee in selling the securities is in the position of trustee for the Client or pledgor, and the law will not allow of the temptation to fraud or the possibility of the same through the trustee's becoming purchaser at his own sale. But the pledgor has the option to treat the sale as valid, and to accept the benefits thereof.<sup>2</sup>

In *Brookman vs. Rothschild*,<sup>3</sup> where the 20,000 rentes were purchased by the Brokers themselves, the decree of the court

<sup>1</sup> Evans on Ag. 14; Kimber vs. id. 269; Bryson vs. Rayner, id. 424; Barber, L. R. 8 Ch. App. 56. Star Fire Ins. Co. vs. Palmer, 9 J. &

<sup>2</sup> Brookman vs. Rothschild, 3 Sim. S. (N. Y.) 267; Richardson vs. Mann, 224; aff'd in H. L., 5 Bligh (n. s.), 30 La. Ann. 1060; Wright vs. Ross, 165; Pigot vs. Cubley, 15 C. B. (n. s.) 36 Cal. 414; Bryan vs. Baldwin, 7 702; Stokes vs. Frazier, 72 Ill. 428; Lans. 174; aff'd 52 N. Y. 232; Hope Chicago Artesian-well Co. vs. Corey, vs. Laurence, 1 Hun. 317; Duden vs. 60 id. 73; Bank vs. Dubuque & Pacific Waltzfelder, 16 id. 337; Middlesex R. R., 8 Iowa, 277; Hamilton vs. State Bank vs. Minot, 45 Mass. 325; Ainsworth vs. Bowen, 9 Wis. 348; Hestonville R. Co. vs. Shields, 3 Brews. vs. Dalrymple, 25 Md. 242; Baltimore Marine Ins. Co. vs. Dalrymple, (Pa.) 257.

<sup>3</sup> Supra.



was that they should deliver the same to the Client, together with all of the dividends thereon, upon being repaid the sum with interest which the Client had originally received for them; or that the Client should receive an amount equal to the present value of the rentes.

And the other cases cited above hold that the Client, if the Broker has sold the stocks, may elect to affirm the sale and recover the proceeds; or that he may treat the illegal disposition as a conversion and recover damages for the same.<sup>1</sup> And where a Broker sold shares in a Water Company to his Client, through third parties, the court directed that the defendant Broker should take back the shares with all the dividends which had been paid upon them, and that he should pay to the plaintiff, his Client, the purchase-money, with interest at the rate of five per cent., and the costs of the suit.<sup>2</sup> So, where a Broker purchases shares from a third party with the view of selling them himself to his Client, in the execution of an order to purchase, and does sell the same to his principal at a price higher than that at which he himself purchased, the Client may recover the difference between the price at which the Broker bought and that at which he sold the shares; and this, although the Client has parted with a portion of the shares, so that he might not be in a position to rescind the transaction.<sup>3</sup>

One B., a Broker, knowing that one K. was desirous of obtaining shares in a certain company, called upon K. and told him that he knew where the shares could be purchased at £3 per share, and was authorized to make the purchase at that price. B. then went to a person who had the shares for sale

<sup>1</sup> See, in addition to the authorities just cited, *Taussig vs. Hart*, 49 N. Y. 301; *id.* 58 N. Y. 425; *Pickering vs. Demeritt*, 100 Mass. 416; *Day vs. Holmes*, 103 *id.* 306.

<sup>2</sup> *Gillett vs. Peppercorne*, 3 Beav.

<sup>3</sup> *Kimber vs. Barber*, L. R. 8 Ch. App. 56.

and bought them for £2 per share, and made the sale and transfer of the shares to K. through a third person. K. subsequently discovering that B. was, in fact, the owner of the shares, brought an action against B., in which he prayed for alternative relief, either that B. might be decreed to pay K. the difference between the prices paid, or otherwise that the sale of the shares might be set aside, and the purchase-money repaid upon a retransfer of the shares. Previous to bringing the suit, K. had transferred part of the shares; and the Master of the Rolls, on this ground, held that the transaction could not be set aside. And he refused to give the plaintiff the difference between the prices paid, for the reason that it would be making a new contract between the parties. On appeal, the decree of the Master of the Rolls was reversed, and the plaintiff, K., was allowed to recover the difference in the prices paid. But the court did not undertake to decide whether the transaction could be set aside, K. having parted with a portion of the shares.<sup>1</sup>

### *VIII. When Broker can Close Transaction.*

In the absence of express agreement, the Broker may, at his option, upon reasonable notice, require the Client to take the stocks which he may be carrying for him, and thus close the transaction.<sup>2</sup> As the Client may at any time require the delivery of the stocks to him or the transaction closed upon paying the amount advanced for their purchase, with commissions and interest, so the Broker, in the absence of agreement, has the reciprocal right to require the Client at any time to "take up" the stocks or close the transaction, and to repay him the amount due thereon. Although the Client's

<sup>1</sup> *Kimber vs. Barber*, L. R. 8 Ch. 459; *ling vs. Jandon*, 48 Barb. (N. Y.) 459; App. 56. *Merwin vs. Hamilton*, 6 Duer (N. Y.), 244.

<sup>2</sup> *Stenton vs. Jerome*, 54 N. Y. 480, 482; *Esser vs. Linderman*, 71 Pa. St. 76; *White vs. Smith*, id. 522; *Ster-*

margin may not be exhausted, the Broker is not bound to continue the transaction for an indefinite period. He earns his commission by making the transaction, and in the absence of agreement it would seem but reasonable to assume that he should be able to discontinue the relation after a reasonable time at least. But there is no express adjudication upon this point, and much can be said on both sides of the question.<sup>1</sup>

So there is another instance where the Broker seems to be entitled to sell the Client's stocks—viz., where the latter becomes a bankrupt; and it has been decided<sup>2</sup> that where a Broker holds stocks for a Client on a margin, and the latter becomes a bankrupt, it is the duty of the Broker to take notice of this fact; and that where the Broker continued to hold the stocks after such bankruptcy for an unreasonable time, and then sold them without any application or consent of the assignee or bankruptcy court, and without notice to any one, the bankrupt's estate was not properly chargeable with the loss.

If the transaction be a "long one"—viz., a purchase of stocks for the Client—the better practice would be for the Broker to make up a statement of the account and tender the securities to the Client with a blank power of attorney to transfer, and offer to deliver the same upon payment of the amount due.<sup>3</sup>

If, on the other hand, the transaction consists of a short sale, the Broker should give the Client a notice, informing him that he desired the transaction closed either by a purchase of the stock or a transfer of the operation to some other person or office, as has been indicated above under the head of "short sale."

<sup>1</sup> Id.

(N. Y.), 244; *Wynkoop vs. Seal*, 64

<sup>2</sup> *In re Daniels*, 13 Nat'l Bankr. Reg. 46.

Pa. St. 361; *Rosenstock vs. Tormey*, 32 Md. 169; *Genin vs. Isaacson*, 6

<sup>3</sup> *Merwin vs. Hamilton*, 6 Duer N. Y. Leg. Obs. 213.

When a Stock-broker fills an order for the purchase of stock, and his principal makes default, and he thereupon resells the stock at a loss, it is necessary for him, in order that he may recover the amount of such loss from his principal, to show that the stock was actually purchased by himself or by an agent under his direction, at its fair market price on the day of purchase, and that he actually paid the purchase-money therefor; that he notified his principal of the purchase, and requested him to receive the stock and pay the price paid for it with reasonable commissions; that at the time of this notice he was in condition to deliver the stock, by having it or other proper *indicia* of title actually in hand or in the hands of his agent; that on the failure of the principal to receive the stock he, after reasonable time and notice to that effect to the principal, directed it to be sold; and that it was sold by his agent either at public sale in market overt, or at a sale publicly and fairly made at the Stock Exchange, or a Stock Board or a Board of Brokers, where such stocks are usually sold at a fair market value on the day of sale.<sup>1</sup>

So it has been held<sup>2</sup> that where Brokers purchased in their own names, and without disclosing the name of the Client, certain stocks for the latter, before they could maintain an action against the latter for a depreciation in the price of the stocks, they were bound to tender the stocks to the Client; and that where it appeared that this was not done, and that the Brokers sold the stock without any notice of the sale, they could not recover from their principal.

But where the Brokers have not sold the stocks purchased for their Client, in an action against him to recover the advances made by the Brokers and their commissions on such purchase, it is not necessary for them to produce the certifi-

<sup>1</sup> *Rosenstock vs. Tormey*, 32 Md. 169.

<sup>2</sup> *Merwin vs. Hamilton*, 6 Duer (N. Y.), 244.

cates of stock on the trial or account for their non-production, where they give testimony that they bought and have the same in their possession. It is not until the Client has paid or tendered the sum laid out that he can demand its delivery.<sup>1</sup> And where plaintiffs' Brokers and copartners brought an action to recover an amount claimed to be due upon an alleged agreement as to the sale and purchase of stocks on defendants' joint account, it appeared that plaintiffs purchased for defendant T. 56,650 shares of a certain stock. The referee, in stating the account between the parties, credited plaintiffs with 24,200 shares sold by them, and excluded from such account 32,450 shares, although he found that plaintiffs had bought and paid for the latter on account of the defendant T. As to them he also found that on April 20, 1874, they were not in the possession of plaintiffs, but prior to that time had been pledged by them for a loan of money for their use, and had never been tendered to T. and the amount due thereon demanded. He found, as conclusions of law, that plaintiffs could not recover for the purchase of said 32,450 shares, unless they showed performance of a contract on their part. He also found that the pledge of the stocks and suffering them to be sold by the pledgee was not such a performance, and that defendants were not bound to redeem the stock so pledged, and plaintiffs could not recover for the purchase of such stock. Plaintiffs claimed that their pledge of the stock was not a failure to perform a condition precedent, but a breach of a condition subsequent, which is to be compensated in this action by a recoupment or counter-claim of the damages.

<sup>1</sup> Id. And where upon a contract the ground that the seller was not to deliver certain shares of stock "at seller's option, sixty days," the purchaser makes his demand for the stock at the proper time and in the proper form, is then ready to pay the price, and is refused the delivery on the ground that the seller was not able to make it, it is not necessary to the former's right of action for the breach that he should have made an actual offer or tender of the money (Wheeler vs. Garcia, 40 N. Y. 584). Munn vs. Barnum, 24 Barb. 233.

Held, that the finding of the referee was erroneous; that the purchase of the stock was upon T.'s account, and was a proper charge against him; and the sale of the stock was a failure to perform a subsequent duty, and no condition precedent was broken which prevented plaintiffs from charging T. for the purchase of the stock.<sup>1</sup>

### *IX. When Broker can Act by Substitute.*

The general rule of law is, that a Broker, like an attorney, is selected as a specialist on account of his presumed skill and discretion, and of the confidence consequently bestowed on him by the principal. He cannot, therefore, depute his duties, so far as they are discretionary, to another, except in cases of necessity, *or in cases in which such deputation is sustained by usage, of which it may be implied that the principal is cognizant.*<sup>2</sup> The rule being that, if a principal constitute an agent to do a business which obviously, and from its very nature, cannot be done by the agent otherwise than through a substitute, or if there exist in relation to that business a known and established usage of substitution in either case, the principal would be held to have expected and have authorized such substitution.<sup>3</sup> Applying these general principles to the business of Wall Street, it will be very easy to sustain the usage, so universally prevalent there, of transacting business through one or more subordinate Brokers who are necessarily employed, either for secrecy or despatch, in the execution of the Client's business or orders. And where an order to purchase stocks is given by a Client to his Broker in Balti-

<sup>1</sup> Capron vs. Thompson, 13 N. Y. Weekly Dig. 199. See also Cahill vs. Hirschman, 6 Nev. 57.

<sup>2</sup> Wharton on Ag. §§ 709, 711; Cockran vs. Irlam, 2 Maule & S. 301.

<sup>3</sup> Moon vs. Guardians of Witney

Union, 3 Bing. (N. C.) 814; Ledoux vs. Goza, 4 La. Ann. 160; White vs. Fuller, 4 Hun (N. Y.), 631; Commercial Bank vs. Norton, 1 Hill, id. 501, 505; Elwell vs. Chamberlain, 2 Bosw. id.

230.

more, and the order is general in its terms—not directing the purchase to be made in any particular place or mode, and not containing any restrictions as to price—the Broker has the right to make the purchase in New York through correspondents—Brokers or sub-agents residing and doing business in that city.<sup>1</sup>

But it has been held that when a Broker, not being in London, employs a second Broker to make a bargain for him on the Stock Exchange, there is no privity between the principal and such second Broker; and therefore, if the principal seek to make the latter a defendant in a suit for specific performance, the bill will be demurrable.<sup>2</sup>

Defendants, who were bankers and Brokers, gave to plaintiff a letter to their correspondent G., a Stock-broker in Philadelphia, stating, "This will introduce to you J. Any orders he may give you please execute on our account and advise us." G. took his orders from plaintiff in the purchase and sale of stocks, but reported to defendants and made his calls upon them for the necessary margins. In their accounts, defendants also treated plaintiff as dealing directly with them; and he was charged on their books with the stocks, commissions, and interest, and credited with the proceeds of sales. Held, that defendants were the agents of plaintiff, and they could not ignore G.'s agency, and cast the responsibility of a loss upon plaintiff, simply because his orders were taken and obeyed in the purchase and sale of the stocks.<sup>3</sup>

### *X. Commission of Broker.*

In respect to the commission or compensation which a Stock-broker is entitled to receive for transacting the business

<sup>1</sup> *Rosenstock vs. Tormey*, 32 Md. Notes, 245. But see *Gregory vs. Wendell*, 40 Mich. 432.

<sup>2</sup> *Booth vs. Fielding*, 1 Week. <sup>3</sup> *Gheen vs. Johnson*, 90 Pa. St. 38.

of the Client, the amount thereof rests either upon an express or an implied agreement. Of course, whenever there is an express agreement by which the amount of the commissions is definitely fixed, all greater or other rates are excluded.<sup>1</sup> But frequently, in employing a Stock-broker, nothing is said as to the amount of his commissions, in which case they must be ascertained by other means. There is a uniform rate fixed by the New York Stock Exchange which is generally observed by the Brokers in dealings with their Clients.<sup>2</sup> And the law seems to be that where a Broker is employed, and no special compensation is agreed upon, the rate of brokerage customarily charged for the same services is the proper measure of damages. The parties are then presumed to have contracted in reference to the usage.<sup>3</sup>

As has been shown in the chapter on "Usages," the law is that where there is a general usage in any particular trade or branch of business, parties having knowledge of the usage are presumed to contract in reference to it; and, if the usage does not conflict with the terms of the contract, it will be deemed to enter into and constitute a part of it. Knowledge of the

<sup>1</sup> Wharton on Ag. § 323; Bower vs. Jones, 8 Bing. 65; Ware vs. Hayward Rubber Co., 85 Mass. 84.

<sup>2</sup> Art. XVIII. Const. §§ 1, 2, and 3. By these rules a commission of one eighth of one per cent. is chargeable on all transactions in securities made for parties not members of the Exchange, other than gold, government bonds, and exchange. The minimum rate to members of the Exchange is one thirty-second of one per cent., except in certain cases, when it may be one fiftieth of one per cent. The rates are based upon the par value of the securities.

On mining stocks selling in the market at not over \$5 per share the commission shall be \$3.12½; on shares

selling at not over \$10 and above \$5 per share, \$6.25; on shares selling above \$10 per share, \$12.50 per 100 shares. The minimum commission to members of the Exchange shall be \$1 per \$100 on all shares selling at \$10 and below. But in all other cases the rate shall be the same as directed in this article to Railroad stocks.

<sup>3</sup> Morgan vs. Mason, 4 E. D. Smith (N. Y.), 636; Miller vs. Ins. Co. of North America, 1 Ab. New Cas. id. 470, and note, which contains a collection of cases on the extent to which usage is admissible to establish a rate of compensation; see also Erben vs. Lorillard, 2 Keyes (N. Y.), 567; Adams vs. Capron, 21 Md. 186; Deshler vs. Beers, 32 Ill. 368.



usage may be established by presumptive as well as by direct evidence. It may be presumed from surrounding facts, as the uniformity, long continuance, and notoriety of the same.<sup>1</sup>

And it is held<sup>2</sup> that an agreement between Brokers to share commissions earned by one on information given by the other is legal.

But it seems that a Broker or Agent is not always entitled to a commission, although he may have performed the work or transacted the business for which he was employed.

Mr. Parsons lays down a proposition<sup>3</sup> which seems to be very generally accepted by the courts, that "neither a factor nor a Broker can have any valid claim for his commissions or other compensation if he has not discharged all the duties of the employment which he has undertaken with proper care and skill and entire fidelity." This necessarily embraces all acts of bad faith on the part of the Broker; and it even applies where a Broker, without fraudulent intent, receives commissions from a conflicting interest.<sup>4</sup>

In the State of New York, however, it has been held that where a trustee wrongfully invested trust funds in securities not authorized by law, such act did not deprive him of his right to commissions; and Mr. Justice Woodruff doubted whether even misconduct or gross negligence would operate to debar trustees of their authorized compensation, where no imputation of fraud rests upon them.<sup>5</sup>

A Broker is never entitled to commissions for unsuccessful efforts, even though, after his failure and the termina-

<sup>1</sup> See chap. on "Usages" and cases cited above (*Easterly vs. Cole*, 3 N. Y. 502). Ag. § 331; *Levy vs. Loeb*, N. Y. Ct. App. Oct. 1881, not yet reported.

<sup>2</sup> *McLaughlin vs. Barnard*, 2 E. D. Smith (N. Y.), 372.

<sup>3</sup> *Parsons on Con.* (6th ed.) \*100, and authorities cited.

<sup>4</sup> *Wharton on Ag.* § 336; *Story on*

<sup>5</sup> *King vs. Talbot*, 40 N. Y. 76; *Vanderheyden vs. Vanderheyden*, 2 Paige (N. Y.), 288; *Rapalje vs. Norisworthy*, 1 Sand. Ch. (id.) 406; *Meacham vs. Stearns*, 9 Paige (id.), 405.

tion of his agency, his labor proves of use and benefit to his principal. He does not, however, lose his commissions where his efforts are rendered a failure by the fault of his principal, or where the purchaser declines to complete because of a defect which is the fault of the principal.<sup>1</sup>

What constitutes a faithful performance of the Broker's duties depends greatly upon the nature of the business committed to his hands. It has been held, for instance, that he is obliged to keep and render a correct account of the business transacted.<sup>2</sup> And, although he may not absolutely forfeit his commission by a failure to do this, it may be construed as a failure of duty on his part, or as a suppression of evidence.<sup>3</sup>

The case of *Hoffman vs. Livingston*<sup>4</sup> peculiarly illustrates the question of a right of a Stock-broker to recover his commissions. The plaintiff there sued to recover his commissions on transactions in stocks made for account of defendant. The transactions were conducted by the plaintiff under an arrangement by which the latter speculated for the defendant under a discretionary order, buying and selling whenever he deemed it advisable. Under this arrangement plaintiff made numerous transactions, resulting in a loss to the defendant of a large sum, more than one half of which was for commissions. Notice of each transaction was not given to the defendant in accordance with the custom of Brokers.

The action was contested on the ground that the circumstances showed that the operations were made with a view of merely yielding commissions for the benefit of the Broker, and it was held that the failure of the latter to give notice to his Client of each transaction was a neglect of duty which was a sufficient bar to the recovery of commissions. The

<sup>1</sup> *Sibbald vs. Bethlehem Iron Co.* (N. Y. Ct. App.), 11 N. Y. Week. Dig. 445.

<sup>2</sup> *Clark vs. Moody*, 17 Mass. 145.

<sup>3</sup> *Lupton vs. White*, 15 Vesey, 432, 640; *Hart vs. Ten Eyck*, 2 Johns. Ch. 42, 108.

<sup>4</sup> 14 J. & S. (N. Y.) 552.

rule of law is that if the Broker's services are wholly abortive, or executed in such a manner that no benefit results from them, he is not entitled to recover either his commissions or even a compensation for his trouble. That the question is one of due diligence and ordinary skill, and the want of this may be the result of inattention or incapacity. It is not necessary in such case for defendant to show actual fraud.<sup>1</sup>

It has also been held that a Broker employed to purchase government bonds for a Client cannot act in the same transaction as agent for the seller, and receive commissions from both sides, although this may be done where the Client expressly assents to the same.<sup>2</sup>

### *XI. Communications between Broker and Client not Privileged.*

A wise public policy dictates that certain kinds of evidence should not be received in legal controversies, either because of the confidential relations existing between the parties, as in the case of husband and wife, or because of the subject-matter of the evidence itself. Under this last head are included secrets of State and papers and communications confided by a Client to his legal adviser. In the latter case the attorney's mouth is not sealed because of the confidential relations existing between him and his Client, for the privilege was not extended to other professions by the common-law, but because the interests of justice demand that the Client should be able to lay before his counsel the full facts of his case without fear of future disclosure; and this not only for his own assurance, but also to enable the attorney to exercise properly the duties of his profession.<sup>3</sup>

<sup>1</sup> For cases where Stock-brokers have sued for commissions earned in illegal transactions, and for money laid out, etc., in the same, see chapter "Stock-jobbing."

<sup>2</sup> *Levy vs. Loeb*, N. Y. Ct. of App., not yet reported, Oct. 1881.

<sup>3</sup> The earliest reported case on the subject is *Berd vs. Lovelace*, Cary (anno 19 Eliz.), 88; see also Green-

It may be added that in some of the states the same protecting policy has been extended to confessions made to a clergyman, in the course of the discipline enjoined by the rules of his denomination, and to knowledge gained by a physician in attending a patient, which knowledge was necessary to enable him to prescribe for the disease.<sup>1</sup> And in England,<sup>2</sup> Best, C. J., said that he for one would never compel a clergyman to disclose a communication made to him by a prisoner.

It seems, however, that the privilege may be waived. The principle which underlies the exclusion of this evidence is that of public policy: the public benefit arising from its suppression, in the great majority of cases, overweighs the occasional hardship of the rule when applied to particular instances.<sup>3</sup>

Although, in practice, the communications and transactions between a Broker and his Client are regarded and observed as sacredly confidential, yet they are not considered as being in anywise embraced within the rules to which we have alluded. In a case in England,<sup>4</sup> a Stock-broker was held bound to discover the names of the persons for whom he had purchased shares in a joint-stock company which had neither been incorporated, chartered, nor registered, and which was regulated by no deed of settlement, and whose shares passed by delivery.

The case is valuable in demonstrating that the liability of a Broker to answer, in ordinary transactions between himself and Client, is unquestioned; that only in cases presenting special features can he refuse to answer, and his refusal in

ough vs. Gaskell, 1 Myl. & K. 101; 1 1845, ch. 186, §§ 19, 20; Rev. Stat. of Greenleaf on Ev. § 236 et seq., and Mich. 1846, ch. 102, §§ 85, 86. cases cited.

<sup>2</sup> Broad vs. Pitt, 3 Car. & P. 518.

<sup>1</sup> Wis. Rev. Stat. 1849, ch. 98, § 75; <sup>3</sup> 1 Greenleaf on Ev. § 236.

Wis. Rev. Stat. 1878, 992; Iowa Code, <sup>4</sup> Re Mex. and So. Am. Co., re arts. 2393, 2395; N. Y. Code of Civil Aston, 27 Beav. 474. Proc. §§ 833, 834; Rev. Stat. of Mo.

such cases would be grounded on no peculiar privilege extended to Brokers, but on a protection common to all classes ; as, for instance, where the Broker relies on the rule of law exempting persons from testifying where their answers would expose them to a fine, penalty, or criminal prosecution.

The case of *The Mercantile Credit Association*<sup>1</sup> also strongly illustrates this point. In winding up this association the name of one D. appeared on the list of shareholders as a holder of certain shares. "Calls" had been made by the official liquidator on these shares, no part of which had been paid. The liquidator having caused inquiries to be made with respect to the ability of D. to pay the calls, it was discovered that he had no property whatever ; and that, at the time the shares were transferred to him, he was an infant living with his father, receiving wages as clerk to a law stationer, but with no other source of income. The transfer had been made to him with his consent, and, although he had come of age, he had not repudiated it. One C., a Broker, had proposed to act on his behalf in the matter of the transfer, and it was through C.'s agency that D.'s name was placed upon the register. The official liquidator applied to the Broker for information as to the circumstances attending the transfer, in the hope of being able to make the transferee liable for the amount due on the shares, but the Broker refused to give any such information. The liquidator accordingly moved for an order to summon him before the court for the purpose of being examined as a person whom the court might deem capable of giving information concerning the trade, dealings, estate, or effects of the company.

Wood, V. C., in giving his opinion, said that he "was surprised that such applications should always be strenuously opposed on behalf of the proposed witness ;" and he accordingly

<sup>1</sup> 37 L. J. (n. s.) pt. 1, 295.

ordered that C. should be summoned to attend the judge in chambers at such times as the judge might designate, touching the estate and effects of the association.<sup>1</sup>

Considering the vast strides the business of dealing in securities has made within the last decade, and a growing disposition on the part of Brokers to assert the privilege hitherto denied them, the question is probably destined to pass under the cognizance of the courts with greater frequency, and in cases involving more gigantic interests than ever before.

As yet the few adjudicated cases show that the courts, recognizing no public policy sufficiently urgent to demand the secrecy of such transactions, have uniformly checked the effort of the Broker to place himself in the category of those protected by the law of privileged communications.

It by no means follows, however, because such transactions are not privileged, that they are public; that a resort to a Broker's books can be had *ad libitum*, to satisfy an idle curiosity, or entries thrown open to what the courts have termed a "fishing excursion." On the contrary, the courts scan with jealous eyes all attempts of that nature; and it is only where the party shows a clear legal right to the remedy, and in cases where the interests of justice demand a discovery, that a Broker's books or a Broker's testimony as to dealings with his Client is evidence at the instance of an adverse suitor.

<sup>1</sup> See also, on same point, *Raw-Tyre*, 18 Beav. 366; *Matthews Est.* 4 *lings vs. Hall*, 1 Car. & P. 11; *Green Am. L. J.* (n. s.) 356; *In re Finan. vs. Weaver*, 1 Sim. 404; *Williams vs. Ins. Co. (Lim.)* 36 L. J. (n. s.) 687.

# CHAPTER IV.

## STOCK-BROKERS IN ENGLAND.

- I. *Statutes relating to Stock-brokers.*
- II. *Decisions under Statutes.*
- III. *Commissions of Brokers, and Actions for, by Unlicensed Brokers; Actions by Licensed Brokers acting in Illegal Transactions.*
- IV. *Origin and History of London Stock Exchange, and Rules and Regulations thereof.*

### I. *Statutes relating to Stock-brokers in England.*

IN England, as in the United States, transactions in stocks are carried on through the instrumentality of Stock-brokers. Some of these Brokers are members of the Stock Exchange; others are not. We shall first touch upon the law as applicable to Stock-brokers in general, and then consider the legal status of Brokers as members of the Exchange, with which subject we are principally concerned in this treatise.

By an act passed in the year 1707, which is given in full in the notes,<sup>1</sup> all persons acting as Brokers in the city of London

<sup>1</sup> 6 Anne, c. 16, 1707, entitled "*An Act for Repealing the Act of the first year of King James the First, intituled 'An Act for the Well garbling of Spices,' and for Granting an Equivalent to the City of London by Admitting Brokers.*"

"I. Whereas by an Act of Parliament made in the first year of the Reign of King James the First, in-

tituled '*An Act for the Well garbling of Spices,*' several Drugs, wares, spices, and Merchandize are to be garbled within the city of London and the liberties thereof, as therein is mentioned, under the penalties and forfeitures therein specified, and several powers are thereby given to the garbler for the time being for that pur-

and liberties thereof, shall from time to time be admitted to do so by the Court of the Mayor and Aldermen of the said

pose; which act for the garbling of spices and other wares and merchandizes in many cases has now become useless, and in other cases would be prejudicial and to the Damage of several wares and merchandizes so to be garbled, to the obstruction and discouragement of the Trade of this Kingdom, and the Foreign Exportation, and to the vexation of the subjects by . . . unnecessary Prosecutions in her Majesty's Court of *Exchequer*; Be it therefore enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, That the said Act shall be and from henceforth stands repealed, and all powers, penalties, and forfeitures therein mentioned or given shall from henceforth be null and void. .

"II. And be it further enacted that by authority aforesaid, That all suits and informations now depending in her Majesty's Court of *Exchequer* or in any other Court, or which shall at any time hereafter be brought or prosecuted upon the said Act under pretence of any seizure or forfeiture or penalty incurred for breach of the said Act, or for any offence committed or supposed to be committed against the same, shall be and are hereby declared to be discharged, discontinued, and determined, and that no proceedings shall be had thereupon; and all seizures upon the said Act made or to be made are hereby declared to be discharged, released, null and void.

"III. Provided always that it shall and may be lawful for the Lord Mayor and Court of Aldermen and Common Council of the City of London for the time being to appoint from time to time a fit and able person to execute the office of Garbler

in the City of *London* and the liberties thereof, who at the request of any person or persons, owner or owners of any Spices, drugs, or other wares or merchandizes garbleable and not otherwise, shall garble the same; and such Garbler shall have and receive for his pains and trouble therein as the said Lord Mayor, Court of Aldermen, and Common Council shall appoint and no more.

"IV. And whereas the profits of the said office are part of the Revenues and Incomes of the City of *London*, and are now let by Lease to *William Stewart*, under the rent of three hundred pounds per annum, the profits of which office and the Right of the said *William Stewart* to the same by repealing the said Act will be very much diminished. Be it enacted by the authority aforesaid, That from and after the Determination of this present session of Parliament, all persons that shall act as Brokers within the City of London and liberties thereof shall from time to time be admitted to so do by the Court of Mayor and Aldermen of the said City for the time being under such restrictions and limitations for their honest and good behavior as that Court shall think fit and reasonable, and shall upon such, their admission, pay to the Chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of forty shillings, and shall also yearly pay to the said uses the sum of forty shillings upon the nine-and-twentieth day of *September* in every year, all which moneys shall in the first place be applied for and towards the paying and satisfying to the said *William Stewart* the sum of nine hundred sixty-seven pounds and ten shillings for the compensation for his interest in the said office; and that from and after the full payment of the said



city, under such restrictions and limitations for their honest and good behavior as that court shall think fit and reasonable; and shall upon their admission be compelled to pay forty shillings, and a like sum yearly thereafter; and it was also provided by the last section of the act that if any person shall take upon himself to act as Broker, or employ any person under him to act as such, said person should forfeit and pay to the use of the Mayor, of said city, for every such offence, the sum of five-and-twenty pounds, to be recovered by action of debt.

By statute of 7 Geo. II. c. 8, § 9, every Broker or other person who shall negotiate or act as a Broker, receiving brokerage in the buying or disposing of stocks, shall keep a Broker's book, in which he shall enter all contracts that he shall make on the day of the making of such contract, with the names of the principal parties; and such Broker who shall not keep such book, or shall wilfully omit to enter any such contract, shall forfeit £50.

In the year 1708, after the passing of the statute of Anne above referred to, the Court of Mayor and Aldermen of the City of London made certain rules and regulations for the government of Brokers.

sum of nine hundred sixty-seven pounds and ten shillings to the said William Stewart, all the moneys arising by such admissions and yearly payments shall go to and be enjoyed by the said Mayor and Commonalty and Citizens of the City of London; and that from and after the determination of this present sessions of Parliament, the said lease to the said *William Stewart* and every clause therein contained shall cease, determine, and be absolutely void.

"V. And be it further enacted by the authority aforesaid, That if any person or persons from and after the determination of this present ses-

sions of Parliament shall take upon him to act as a Broker or employ any other under him to act as such, within the said City and liberties, not being admitted as aforesaid, every such person so offending, shall forfeit and pay to the use of the said Mayor and Commonalty and Citizens of the said City, for every such offence, the sum of five-and-twenty pounds, to be recovered by action of debt in the name of the Chamberlain of the said City, in any of her Majesty's Courts of Record, in which no Protection, Essoin, or wager of Law shall be allowed, or any more than one Imparlance."

The bond of the Broker was as follows :<sup>1</sup> "That the said A. B., for and during such time as he shall and doth continue in the said office and employment, shall and do well and faithfully execute and perform the same without fraud, covin, or deceit ; and shall, upon every contract, bargain, or agreement by him made, declare and make known to such person or persons with whom such agreement is made, the name or names of his principal or principals, either buyer or seller, if thereunto required, and shall keep a book or register, and therein truly and fairly enter all such contracts, bargains, and agreements within three days at the farthest, after making thereof, together with the names of all the respective principals for whom he buys or sells, and shall, upon demand made by any, or either of the parties, buyer or seller, concerned therein, produce and show such entry to them, or either of them, to manifest and prove the truth and certainty of such contracts and agreements, and for satisfaction of all such persons as shall doubt whether he is a lawful and sworn Broker or not, shall, upon request, produce a medal of silver with his Majesty's arms engraven on one side, and the arms of this city, with his name, on the other, and shall not directly, or indirectly, by himself or any other, deal for himself or any other Broker in the exchange or remittance of money, or in buying any tally or tallies, order or orders, bill or bills, share or shares, or interest in any joint stock to be transferred or assigned to himself or any Broker, or to any other in trust for him or them, or in buying any goods, wares, or merchandises to barter and sell again upon his own account, or for his own or any other Broker's benefit or advantage, or to make any gain or profit in buying or selling any goods over and above the usual brokerage ; and shall and do discover and make known to the said Court of Mayor and Aldermen, in writing, the names and places of

<sup>1</sup> Ex parte Dyster, 1 Mer. 156.

abode of all and every person or persons, as he shall know to use and exercise the said office or employment, not being thereunto duly authorized and empowered as aforesaid, within thirty days after his knowledge thereof, and shall not employ any person under him to act as a Broker within the said city and liberties thereof, not being duly admitted as aforesaid, and shall not presume to meet and assemble in Exchange-Alley, or other public passage or passages within this city and liberties thereof, other than upon the Royal Exchange, to negotiate his business and affairs of exchange, to the annoyance or destruction of any of his Majesty's subjects, or any other in their business or passage about their occasions." The oath administered was as follows: "You shall sincerely promise and swear that you will truly and faithfully execute and perform the office and employment of a Broker, between party and party, in all things appertaining to the duty of the said office or employment, without fraud or collusion, to the best of your skill and knowledge."

The penalty of £25 under the act of Anne was subsequently, by act of 57 Geo. III. c. 60, raised to £100.

There is also an act<sup>1</sup> relating to Stock-brokers in Ireland

<sup>1</sup> 39 Geo. III. c. 60, 1799; 19 Irish Stat. at Large, 402 (Irish Parliament).

"*An Act for the Better Regulation of Stock-brokers.*"

"*Preamble.* — Whereas, the establishing of regulations by which proper persons only will be permitted to act as Stock-brokers, for the selling and buying of government stock and government securities, and by which the prices at which such stock and securities shall be bought and sold shall be known to the sellers and buyers of such stock and securities, will be beneficial to the proprietors and purchasers of such stock and securities. Wherefore, be it enacted by

the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That, from and after the twenty-fourth day of June, one thousand seven hundred and ninety-nine, a Stock Exchange shall be established in the city of Dublin, at such convenient place and subject to such rules and regulations as shall be approved of by the Lords of his Majesty's Treasury; and that no person shall act in the capacity of a Stock-broker, in the selling or buying of any government stock or government securities on commission,

which we give in this connection. This act, among other things, establishes a regular Stock Exchange in the city of

without having taken out a license for that purpose, under the hands of two or more of the Commissioners of his Majesty's Treasury; and no such license shall be granted unless the Commissioners of his Majesty's Treasury shall think that the person applying for the same is a proper person to be licensed.

"II. And be it enacted, That every such person shall, before such license be granted, enter into a bond to his Majesty, in the penalty of two thousand pounds, for himself, and two securities of five hundred pounds each, conditioned that he will not, during the time he shall continue to be licensed, buy or sell such stock or securities for himself or on his own account, when employed by any person not being a Broker, to purchase or sell such stock or securities, and that he will keep a book to contain entries of all such stock and securities as shall be sold and bought by him, describing the names of the persons to whom he shall sell such stock and securities, and the amount of every sale to every person, and the price at which the same shall be sold.

"III. And be it enacted, That it shall and may be lawful for the Commissioners of his Majesty's Treasury, or any three or more of them, whenever it shall appear to their satisfaction that any person to whom any such license shall be granted is unfit to be licensed, by order under their hands, to annul such license; and from thenceforth such license shall be null and void.

"IV. And be it enacted, That every person who, after the twenty-fourth day of June aforesaid, shall act as a Stock-broker, in selling or buying any government stock or government securities on commission, without having taken out such license, or having

a license for the purpose of force, every such person shall forfeit the sum of five hundred pounds; and every person acting as Broker in the selling and buying of any such stock or securities on commission, who shall advertise, or cause to be advertised, the sale or buying thereof, or shall affix to any part of his house any notification that any such stock or securities are to be sold or bought by him, and who shall sell or buy the same on commission, and shall not have a license for that purpose of force, shall forfeit the sum of five hundred pounds.

"V. And be it enacted, That every person who shall be so licensed as aforesaid shall, every time that he shall sell to any person any government stock or any government security either in debentures or exchequer or treasury bills, give to the person for whom he sold the same an account in writing, signed with his name, of the quantity of such stock or government security so sold, to whom the same was sold, and true rate of purchase or price paid for the same, and shall enter into the said book to be kept by him a like account, together with the name of the person for whom he sold the same, and shall, at the request of the person for whom such stock or securities shall have been sold, show to him or her the entry therein relative to the stock sold for such person. And if any person who shall be so licensed shall sell for any person any such stock or securities, and shall not give such account in writing, as aforesaid, to the person for whom he shall have sold the same, or shall not keep such book, and make such entries therein as aforesaid, or shall not at such request, as aforesaid, permit the person for whom he shall have sold such stock or securities to

Dublin, and the amount of commission which Brokers are authorized to charge is regulated at 2s. 6d. per cent.

By statute of 7 and 8 Will. III. c. 19, § 6, Brokers were prohibited from buying or selling bullion; but that statute was repealed by 59 Geo. III. c. 49, § 12.

The commission of Brokers on contracts for any stock erected by act of Parliament or letters patent is limited by 10 Anne, c. 19, § 12, to 2s. 9d. per cent. Both the acts of Anne and George were amended in the year 1870,<sup>1</sup> which amendatory law we give in the notes.

inspect the entries therein of the account of stock so sold, or shall insert in said account or in the said book any false account of the price at which such stock or securities were sold or bought, every such person shall, for every such offense, forfeit the sum of one hundred pounds, and be disqualified from ever after acting as a Stock-broker in this kingdom.

“VI. And be it enacted, That it shall and may be lawful for every such Broker as aforesaid to demand and take from every person for whom he shall sell any such stock or securities, and from every person to whom he shall sell the same, a fee, at the rate of two shillings and sixpence for each one hundred pounds of such stock or securities, and no more, for brokerage or commission; and if any person so licensed as aforesaid shall take or receive, directly or indirectly, any money or other reward or thing for brokerage or commission for the selling or buying any such stock as aforesaid above the rate aforesaid, every such person shall, for every offence, forfeit the sum of one hundred pounds.

“VII. And be it enacted, That all penalties imposed by this act may be recovered by any person who shall sue for the same by action of debt, bill, plaint or information, in any of

his Majesty's Courts of Record at Dublin in which no essoign, protection, or wager of law, or more than one imparlance shall be allowed.

“VIII. And be it enacted, That this act shall be deemed and considered as a public act, and shall be judicially taken notice of as such without the same being specially pleaded.”

“No such bond to be registered, etc., until breach of condition (31 and 32 Vict. c. 31, amending 39 Geo. III. c. 60).”

<sup>1</sup> 33 and 34 Vict. c. 60:

*“An Act to Relieve the Brokers of the City of London from the Supervision of the Court of Mayor and Aldermen of the said City (9th Aug. 1870).”*

“Whereas, by an act of Parliament made in the sixth year of the reign of Queen Anne, intituled ‘An Act for Repealing the Act of the First Year of King James the First,’ intituled ‘An Act for the Well Garbling of Spices and for Granting an Equivalent to the City of London by Admitting “Brokers,”’ it was, amongst other things, enacted that from and after the determination of the then session of Parliament, all persons that should act as Brokers within the City of London and liberties thereof should from time to time be admitted so to do by the Court of

The practical effect of the statute of 1870 has been

Mayor and Aldermen of the said City for the time being, under such restrictions and limitations for their honest and good behavior as the said Court should think fit and reasonable; and should upon such their admission, pay to the Chamberlain of the said City for the time being, for the uses thereafter mentioned, the sum of forty shillings, and should also yearly pay to the said uses the sum of forty shillings upon the 29th day of September in every year. And it was further enacted that if any person or persons from and after the then session of Parliament should take upon him to act as a Broker or employ any other under him to act as such within the said City and liberties, not being admitted as aforesaid, every such person so offending should forfeit and pay to the use of the said Mayor and Commonalty and citizens of the said City for every such offense, the sum of twenty-five pounds to be recovered as in the said act is mentioned. And whereas, by an act (local and personal) made and passed in the fifty-seventh year of the reign of King George the Third, entitled 'An Act for Granting an Equivalent for the Diminution of the Profits of the Office of Gauger of the City of London, and Increasing the Payments to be made by Brokers,' after reciting among other things the beforementioned act, it was among other things enacted, "That all persons that from and after the first day of July next after the passing of that act should be admitted to act as Brokers within the City of London and liberties thereof by the said court in pursuance of the said recited act of Parliament, should, upon such their admission, over and above the sum of forty shillings required to be paid by the said recited act, pay to the Chamberlain of the said City for the

time being, the sum of three pounds; and should also yearly pay to the said Chamberlain, over and above the said yearly sum of forty shillings required to be paid by the said recited act, the sum of three pounds, on the 29th day of September in every year. And it was, amongst other things, further enacted that so much of the said recited act as imposed a penalty of twenty-five pounds upon any person who should take upon him to act as a Broker, or employ any person under him to act as such, not being admitted in pursuance of the said recited act, should be and the same was thereby repealed; and that from and after the passing of the now reciting act, if any person should take upon him to act as a Broker, or employ, or cause, permit, or suffer any person or persons to be employed with, under, or for him, to act as such within the said City and liberties, not being admitted in pursuance of the said recited act, every such person so offending should forfeit and pay to the use of the Mayor and Commonalty and citizens of the said City for every such offence the sum of One hundred pounds, to be recovered as in the now reciting act is mentioned.

"And, whereas, the said Court of Mayor and Aldermen of the said city (hereinafter called 'the Court'), acting by virtue of the powers conferred upon them by the said recited acts or one of them, or by virtue of some other authority, have from time to time made and established rules and regulations for the admission of Brokers within the City of London and liberties thereof, and have imposed restrictions and limitations on the manner in which the persons whom they have admitted into the office and employment of a Broker within the said City and liberties thereof were and are to carry on their busi-

to allow almost any person to become a Stock-broker

ness as Brokers, and have exercised, and claim the right to exercise, jurisdiction and control over such Brokers for the purpose of enforcing the observance of the said regulations, restrictions, and limitations:

"And, whereas, the said Court have also required every Broker admitted by them to find two sureties to be approved of by the said Court to enter into a bond for the due and just execution by the Broker of his said office and employment, or in place of such sureties have required such Broker to transfer into the joint names of himself and the Chamberlain of the said City stock in the public funds to the nominal amount of One thousand pounds:

"And, whereas, the said Court have also required each Broker admitted by them to enter into his own bond in the penal sum of One thousand pounds, to secure the due performance of his duties as a Broker, and also to secure the annual payment of the sums of two pounds and three pounds to the Chamberlain of the City pursuant to the provisions of the said Acts of the sixth year of the reign of Queen Anne, and of the fifty-seventh year of the reign of King George the Third.

"And, whereas, it is expedient to relieve the said Brokers from the necessity of providing such sureties, or entering into such personal bond, and from the jurisdiction and supervision exercised by the said court over the Brokers in manner hereinafter provided: May it therefore please your Majesty that it may be enacted; and

"Be it enacted, by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same, as follows:

"I. This act may be recited as the 'London Brokers' Relief Act, 1870.'

"II. After the passing of this act, the Court shall not require a Broker, by himself or sureties, to give any bond on his admission as Broker, and the jurisdiction, supervision, and control of the said Court over Brokers in the said city of London and the liberties thereof shall cease, and the said Court shall not have power to make, or enforce any rules, orders, regulations, restrictions, limitations or penalties affecting, except as hereinafter mentioned, the admission of such Brokers or the manner in which the business of such Brokers shall be carried on.

"III. No bond or declaration of trust executed by any Broker, in pursuance of any rules, orders or regulations heretofore enforced shall after the passing of this act be put in suit or enforced, and all sums of stock transferred by way of security as aforesaid shall, from and after the passing of this act, be held in trust for the Broker transferring the same and upon no other trust.

"IV. Nothing in this act contained shall prejudice any proceedings actually commenced before the passing of this act upon any such bond or declaration of trust.

"V. Except as herein expressly enacted, this act shall not extend to take away from the said court such right as they now have under the recited acts to require Brokers to be admitted, or to repeal the penalty of one hundred pounds imposed by the said act of the 57 Geo. III., in the case therein mentioned, or affect the liability of Brokers, when admitted to pay to the Chamberlain of the said city, for the uses mentioned in the said recited acts respectively, the sums of forty shillings and three pounds on admission, and the yearly sums of forty shillings and three

by taking a few preliminary and purely formal steps,<sup>1</sup> the result of which has been much regretted.

## II. Decisions under Foregoing Statutes.

It appears that the first adjudication made under the earliest of the statutes above referred to was the case of *Bosworth vs. Machado*,<sup>2</sup> decided in 1745, wherein it was held that a person who sold South Sea stock was a Broker within the meaning of the act of 6 Anne, c. 16. But before that decision, in the year 1737, it seems that Lord Hardwicke had declared that a person dealing in stock was a Broker,<sup>3</sup> although the particular point there was as to whether a *pawn-broker* was a *trader* within the bankruptcy laws.

pounds, which are made payable by the said recited acts respectively; and the said yearly sums of two pounds and three pounds may be recovered by the Chamberlain of the said city for the time being, in the Mayor's Court of the City of London, or in the City of London Court.

"VI. The court shall keep a list containing the names and addresses of all Brokers who shall from time to time have been admitted; and if any such Broker shall be convicted in any criminal court of felony or fraud, or if a judge of any of the superior courts of law or equity, or a judge in bankruptcy, shall in any action, suit, or other proceeding prosecuted or depending before such judge, and to which such Broker shall be a party, certify (as he is hereby empowered to do) that such Broker has been guilty of fraud, and that he ought to be disqualified from acting as a Broker altogether, or for such period as such judge shall name in the certificate, such Broker shall accordingly be disqualified, as from the date of such conviction or certificate, and his name shall thereupon be removed by the Court of

Aldermen from the list of Brokers either absolutely or for the time mentioned in such certificate."

<sup>1</sup> London Stock Exchange Commission, 1878, which reported upon this subject as follows: "It has been proved to us by the Town-clerk of the City of London that for five hundred or six hundred years the law provided for a complete control over the office of a Broker in the city of London by requiring all persons following that vocation to take out a license, under heavy penalties for acting as Broker without it. The granting this license, and its withdrawal in case of misconduct, was one of the ancient duties and privileges of the corporation of the city of London. In the year 1870, however, an act of Parliament was passed under which the license was retained, and with it the duty of making inquiries into the fitness of the applicant upon the grant of a license, or of punishing misconduct by withdrawing it."

<sup>2</sup> Cited in *Wilkes vs. Ellis*, 2 H. Bl. 556.

<sup>3</sup> *Highmore vs. Malloy*, 1 Atk. 206.



In *Janssen vs. Green*, decided in 1767,<sup>1</sup> it was held that a person who, in the words of 7 Geo. II. c. 8, for brokerage and hire, negotiates and concludes bargains for stocks is a Broker in point of law.

In that case the action was brought to recover the penalty or forfeiture under 6 Anne for acting as a Broker without a license, and Lord Mansfield held that the act against Stock-jobbers, known as Sir John Barnard's act, was decisive of the question as to who was a Broker. After reciting the act, he asks, "Can any words more strongly express what the Parliament meant by a Broker?" Mr. Justice Yates said, "The court will follow the parliamentary idea of a Broker," and he agreed with Lord Mansfield that Sir John Barnard's act was conclusive "as to their idea of a Broker."

That a Stock-broker is a Broker within the statute was, however, directly decided in 1833 by the Court of King's Bench.<sup>2</sup> There the action was likewise brought to recover the penalty of £100 for having acted as Broker without the license required by the act of Anne. In approving the case of *Janssen vs. Green*,<sup>3</sup> the court, per Littledale, J., in the course of an exhaustive opinion upon the subject, said: "Considering the provisions of these statutes, recently before and after the passing of the statute of the 6 Anne, it appears to us that persons buying and selling government stocks and securities for others were considered as Brokers at that time, and must fall under that description in the statute in question. If Brokers dealing in government stock and securities then existing were so, *it does not admit of a doubt* that those who dealt in all subsequently created stock and securities of the like description would be so just as much as merchant Brokers who bought or sold a new description of merchandises." The

<sup>1</sup> 4 Burr. 2104.

<sup>3</sup> *Supra*.

<sup>2</sup> *Clark vs. Powell*, 1 N. & Man. 492; 4 B. & Ad. 846.

same judge, in alluding to the act, said: "That act . . . had in view the regulation of Brokers, and to have secured and enforced the *ancient right* of the city to admit brokers which, by the *Statuta Civitatis Londini*, 13 Edw. I., it appears to have possessed in the earliest times." It was accordingly held that the defendant was liable to pay the penalties imposed for acting as Broker without a license.

There has been, however, some doubt as to the precise meaning of the term "Broker" as used in the statutes.<sup>1</sup> For, so late as 1858, in a much-litigated case,<sup>2</sup> Crowder, J., said: "We must look at the term 'Broker' in the 6 Anne, c. 16, as having been used in its general, popular sense. It is difficult for us at this day to determine, with any degree of accuracy, what Brokers were at that time; there must be many things now dealt with by Brokers that were wholly unknown."

A Ship-broker, or one who obtains on commission freight and passengers for vessels, is, however, not a Broker within the statute;<sup>3</sup> and one of the judges, in this very case, appears to have been of the decided opinion that the term "Stock-broker" was only used after the passage of the act of 8 and 9 Will. III. c. 20, by which the first government loan was raised, and he speaks of a new description of Brokers then existing who were employed in buying and selling tallies—to wit, Stock-brokers.

It has been further held that an auctioneer is not a Broker within the statute of Anne.<sup>4</sup> Nor is a person a Broker who hires or procures, for another, persons to be employed by him in the laying and surveying of a line of railway.

"To make a man a Broker," says Alderson, J., "he must intermediate, and be the agent through whom the contract is

<sup>1</sup> See, on this subject, Paley on Ag. 12, note a.

<sup>2</sup> *Smith vs. Lindo*, 4 C. B. (n. s.) 406.

<sup>3</sup> *Gibbons vs. Rule*, 12 Moo. 539;

<sup>4</sup> *Bing*, 301; s. c. 5 L. J. C. P. 176.

<sup>5</sup> *Wilkes vs. Ellis*, 2 H. Bl. 555.

made.”<sup>1</sup> But the dealing in, or buying and selling for reward of, shares in English or foreign joint-stock banks or companies, or the debts, stock, or securities of foreign governments, is an acting, and assuming to act, as a Broker within 57 Geo. III. c. 60.<sup>2</sup> This was decided upon the authority of *Smith vs. Lindo*.<sup>3</sup>

Slight evidence has been held sufficient to charge a person as having acted as Broker. Thus, where a witness stated that he took S. to an office in the city of London used by the defendant, and upon that occasion four memoranda were made by the defendant, each of the sale by S. of stock to a person whose name did not transpire; that nothing was handed over at the time; and that he did not see any money pass,—held, evidence for the jury of an acting by the defendant as a Broker within 6 Anne, c. 16, and 57 Geo. III. c. 60.<sup>4</sup>

So where A. was an officer of a company formed for the purpose of carrying on the business of Stock-broking, under the name of “Open Stock Exchange,” and in the course of business bought some stock for a Client, and signed the bought and sold notes, the principals not seeing one another, and no one else acting as a Broker in the transaction, it was held that A., who had no license to act as a Broker, was liable to the penalty of £100, imposed by 57 Geo.<sup>5</sup> In one case, it was held by Lord Ellenborough that a London Broker might refuse to allow his employer to inspect his contract book; and it is no breach of his bond if it shall be produced at the proper time, and the Broker does produce it afterwards before a Court of Aldermen.<sup>6</sup> It was also there held that it

<sup>1</sup> *Milford vs. Hughes*, 16 M. & W. 174; 16 L. J. Exch. 40. In the note to this case will be found the case of *Andrewe de Vyne*, A.D. 1455, 34 Hen. VI., from the Liber Dunthorn.

<sup>2</sup> *Scott vs. Jackson*, 19 C. B. (n. s.) 134.

<sup>3</sup> *Supra*.

<sup>4</sup> *Scott vs. North*, 2 L. R. C. P. 270; 15 L. T. (n. s.) 508.

<sup>5</sup> *Scott vs. Cousins*; same *vs. Inglis*, 4 L. R. C. P. 177, 179; 38 L. J. C. P. 156.

<sup>6</sup> *Mayor of London vs. Brandon*, Holt, 438, note; 2 Stark. 14.

was no breach of his bond to employ a person who is not a sworn Broker. But a person who holds himself out as a Broker of the city of London, and is employed by a person who believes him to be such, cannot, when sued by his principal for an account of his transactions as such Broker, protect himself from discovery, in a suit in equity, upon the ground that it may render him liable to penalties for having acted as a Broker without having been duly admitted as such. In this case the M. R. said: "A person holding himself out and acting as a Broker asserts that he is duly qualified to act."<sup>1</sup> And a Broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission.<sup>2</sup> In this case it was held, first, that the policy of the law not only requires that a Broker or agent should act with fidelity to his employer, and should be ready at all times to render a full and clear account of his transaction; but, secondly, from the nature of the case the defendant exclusively possessed the means of stating that account, which the policy of the law entitled the plaintiff to demand.<sup>3</sup>

A sworn Broker of the city of London is in the nature of a public agent; and therefore, in an action against him for negligence in making a contract, the court will compel him to produce his books for the purpose of enabling the plaintiff to inspect them and take a copy of the contract.<sup>4</sup> A defendant has been allowed to amend his plea, after notice of trial

<sup>1</sup> Robinson vs. Kitchin, 2 Jur. (n. s.) 294; 25 L. J. Chanc. 441; L. J., aff'g decision of Romilly, M. R., 21 Beav. 365, 2 Jur. (n. s.) 57; 25 L. J. Chanc. 354. Whether it would make any difference that the principal, at the time of employing the Broker, knew that he was not duly admitted, *quare?*

<sup>2</sup> Green vs. Weaver, 1 Sim. 404; s. c. 6 L. J. Ch. 1.

<sup>3</sup> 1 Sim. 404-424.

<sup>4</sup> Browning vs. Aylwin, 9 D. & R. 801; 7 B. & C. 204.

served and set up, that the plaintiff was not a Broker duly licensed under the 6 Anne, c. 16.<sup>1</sup>

In *Dunbar vs. Wilson*,<sup>2</sup> the Lord Chancellor, considering that one Sylva, a Broker, and a respondent in that case, "had grossly misbehaved himself in the business of a Broker in not keeping books of the contracts made by him pursuant to the act of 7 Geo. II. c. 8, ordered that it should be recommended to the Court of the Lord Mayor and Aldermen, to cause the bond given by him for performance of his duty as a Broker to be put in suit against him for his misbehavior; and, further, to censure him for the same, as they were enabled and ought to do, consistently with law and justice. If a Broker make a contract contrary to the regulations of the city of London, and in violation of the bond into which he has entered with the mayor and aldermen, he is not therefore precluded or disqualified from bringing an action on a contract so made in contravention of his duties under the bond.<sup>3</sup> The remedy against him is an action for the penalty of the bond, and the contract is not *ipso facto* void.<sup>4</sup>

So it has been held<sup>5</sup> that a London Broker could maintain an action on a contract or sustain a proof of a debt arising out of transactions as a merchant, although such transactions are in contravention of the bond which he executes and to the oath which he takes on his appointment; not, however, if the debt or contract arises out of a transaction in which he has acted both as Broker and principal, that being void upon principles of common-law.

<sup>1</sup> *Field vs. Sawyer*, 5 C. B. 844.

<sup>2</sup> 6 Brown, P. C. 231 (1773).

<sup>3</sup> *Kemble vs. Atkins*, 1 Moo. 6; 7 Taunt. 260; Holt, 427.

<sup>4</sup> In this case (Holt, 431, note) is given in full the bond which Brokers were required to execute under the statute of Anne, also the official oath

taken by them upon being licensed. See also *Green vs. Weaver* (supra), where the bond and oath are also given in full.

<sup>5</sup> *Ex parte Dyster*, in the Matter of Moline, 1 Mer. 155; s. c. 2 Rose, B. C. 349.

But it is the duty of a sworn Broker of the city of London to charge his Client only the cost price of articles purchased for him, in addition to his commission; and the Client having averred in an action of assumpsit that the Broker had charged him an amount greater than the cost price, which the plaintiff had paid, it was held that it was sufficient proof of such averment to produce a running unsettled account between the parties, by which it appeared that the Client had paid more than the amount of the overcharges; although on the whole account, and when the balance at a subsequent period was struck, the Client was indebted to the Broker in a sum far exceeding such overcharges.<sup>1</sup> It seems that a Stock-broker was liable to pay to the Chamberlain of London, for the benefit of the corporation, the annual duty of 40s., directed by statute 6 Anne, c. 16, to be received by the Chamberlain from any Broker. It was accordingly held that a mandamus would issue to compel the Commissioners of the Court of Requests to proceed in such an action on behalf of the Chamberlain.<sup>2</sup>

### *III. Commissions of Brokers, and Actions for, by Unlicensed Brokers; Actions by Licensed Brokers Acting in Illegal Transactions.*

But the question that appears to have been most earnestly litigated in England under the statute of Anne, was as to whether an *unlicensed* Broker could sustain an action to recover his commissions, and for moneys paid and expended by him in the purchase and sale of stocks for his Client.<sup>3</sup>

<sup>1</sup> Proctor vs. Brain, 2 Moo. & P. limited by 10 Anne, c. 19, § 12, to 2s. 284; 3 C. & P. 536. 9d. per cent. By statute 29 Geo. III.

<sup>2</sup> Rex vs. Com'rs Ct. of Requests, c. 60 (Irish Parliament), the amount of commissions allowed to be charged 7 East, 292, and note a. by Stock-brokers in Ireland is regulated at 2s. 6d. per cent. The com-

<sup>3</sup> The commission of Brokers on missions to which Brokers are en- contracts for any stock erected by act of Parliament or letters patent is

Upon the subject of commissions, the English courts appear to be unanimous in deciding that such Broker cannot recover them, although the statute imposes a penalty for his illegal action; and the decisions upon this point seem to be based partly upon the ground that the Broker forfeits his compensation by acting in an illegal capacity; for, if he were permitted to recover, it is obvious that the entire object and purport of the statutes would be frustrated, however strongly it might be urged that he would still be liable to pay the heavy fines imposed.<sup>1</sup>

The first case in which this subject came before the English courts was *Cope vs. Rowlands*.<sup>2</sup> It was there held that a Broker could not maintain an action for *work, labor, and commissions* for buying and selling stock unless duly licensed by the Mayor and Aldermen of the City of London under the statute of Anne. In an opinion rendered in the case, Parke, B., gave abundant reason for sustaining the judgment when

titled for their services are stated as follows:

On transactions in British or foreign funds.....	2s. 6d. per ct.
Exchange bills.....	1s. 0d. " "
Colonial, government, and American stock and Railway bonds.....	1s. 0d. " "
On shares under £5.....	1s. 0d. per sh.
Between £5 and £10.....	1s. 6d. " "
Between £10 and £25.....	2s. 0d. " "
Between £25 and £50.....	5s. 0d. " "
£50 and upwards.....	10s. per ct.

—on the consideration money (Royle on the Law of Stocks, etc., p. 41).

As to right of Broker to receive double commission, the London Stock Exchange Commission reported as follows:

"In the one case a Broker receiving orders from two Clients at the same time to buy and sell sets-off, the one against the other, directly, without going to a dealer on the market, divides the turn which is thereby saved between his Clients, and charges brokerage to each. In such a case, the Broker undoubtedly

acts for two Clients in the same transaction, and thereby gets two commissions; yet it is obvious that had he gone into the market and sold and bought again the same stock with a dealer, he would have had to pay the dealer's turn in addition. It is hardly possible, therefore, to object to the course of the Broker, though it is open to this possibility, that he might, under this system of executing the orders he had received, have charged to his Clients the market price for buying and selling, and have kept the term of the market for himself" (Report of London Stock Exchange Commission, July, 1878).

<sup>1</sup> As to when Broker will forfeit his right to recover commissions by acting dishonestly or in bad faith, see ante, p. 233 et seq.

<sup>2</sup> 2 M. & W. 149; 2 Gale, 231; s. c. 6 L. J. (n. s.) Exch. 63.

he said: "The question for us now to determine is whether the enactment of the statute of 6 Anne, c. 16, . . . is merely meant to secure a revenue to the city, and for that purpose to render the person acting as a Broker liable to a penalty if he does not pay it; or whether one of its objects be the protection of the public, and *the prevention of improper persons acting as Brokers*. On the former supposition, the contract with a Broker for his brokerage is not prohibited by the statute; on the latter it is, *for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing.*"

But as to whether the unlicensed Broker could recover *the moneys expended* and laid out at the Client's request in the purchase of stocks, the courts have held that he can; and that he is not precluded from so doing by the mere fact that he acts in an *illegal capacity*, it being held that he recovers quite independently of that character. As was decided in *Smith vs. Lindo*,<sup>1</sup> he could recover the moneys paid for shares, there being nothing to show that the payment was made in pursuance of any *illegal contract*, or that it was a necessary part of the duty of a Broker *as such* to pay the money.

The following cases fully explain the principle:

To a declaration in assumpsit on two bills of exchange by drawer against acceptor and on an account stated, the defendant pleaded generally to the whole declaration that he retained the plaintiff to act as his Broker in the city of London, and as such to enter into contracts there for the purchase of stocks and shares, and to pay certain moneys therefor, and that the plaintiff undertook such employment and did pay certain moneys in the purchase of said stock and shares; and that at the times mentioned the plaintiff was not a duly licensed Broker within the city of London, and that such bills were ac-

<sup>1</sup> 5 C. B. (n. s.) 587. See also *Wicker vs. Gordon*, 2 B. & Ald. 335.



cepted by defendant and received by plaintiff on account of moneys due plaintiff by defendant for having acted as such Broker, etc., held bad on demurrer; and although plaintiff could not recover recompense for his services as Broker, yet he was entitled to recover money paid at defendant's request; and the court held that the contract was not void.<sup>1</sup>

The distinction laid down in this case was subsequently fully recognized in the case of *Jessopp vs. Lutwyche*,<sup>2</sup> where the court held that the statute of Anne does not prevent an unlicensed Broker from recovering money paid at the request of his employer, or for money due on accounts stated with his employer. Parke, B., said: "*Pidgeon vs. Burslem* cannot be surmounted. The statute relating to Brokers only precludes them from recovering remuneration for their services as such."<sup>3</sup> The same judge further said: "That case shows that the disability to act as a Broker only disentitles a person to any recompense for his services as a Broker, and affords no reason why he should not recover from his employer money he has paid at the employer's request, express or implied."<sup>4</sup>

And the doctrine as laid down in the former cases<sup>5</sup> was subsequently in all respects fully reiterated and sustained.<sup>6</sup> As was said by Lord Loughborough: "So upon stock transactions, though the court would not execute the contract; yet where the parties have been settling stock dealings and paying differences, I must bring those into the account."<sup>7</sup>

But where the Broker acts *in illegal transactions*—in most

<sup>1</sup> *Pidgeon vs. Burslem*, 3 Ex. 465; 18 L. J. Ex. 193. <sup>6</sup> See also *Taylor vs. Stray*, 2 C. B. (n. s.) 197, 195; 3 Jur. (n. s.) 964; 26

<sup>2</sup> 10 Ex. 614; 24 L. J. Ex. 65; 3 C. L. J. C. P. 287. <sup>7</sup> *Watts vs. Brooks*, 3 Ves. 612.

<sup>3</sup> 10 Ex. 616. <sup>8</sup> See also *Kemble vs. Atkins*, 1 Moo. 6; 7 Taunt. 260; Holt, 427; Ex

<sup>4</sup> 3 C. L. R. 361. <sup>9</sup> *Smith vs. Lindo*, 4 C. B. (n. s.) 395; 27 L. J. C. P. 196; aff'd on appeal, 5 C. B. (n. s.) 587; 4 Jur. (n. s.) 974.

cases transactions contrary to law or public policy—it has been held that he cannot recover from the Client either commissions or money expended by him at the Client's request in the sale or purchase of stocks in such *illegal transactions*; nor can the Client recover back moneys paid to the Broker therefor.

Hence where B., being employed by A. to purchase certain transferable shares in an unincorporated company, charged and received from him £25 beyond the market price of such shares at the time, it was held that an action would not lie to recover back this sum, the company being within 6 Geo. I. c. 18, and the parties *in pari delicto*.<sup>1</sup> So in an action of assumpsit by a Broker for work and labor and money expended in the purchase of shares in a concern called the “Equitable Loan Bank Company,” it appeared that the company professed to have a capital of £2,000,000 in shares of £50 each; that a deposit of £1 per share was required on the delivery of certificates for shares to the holders; that the shares were to be transferred without any restriction; and that the holders were to be subjected to such regulations as might be contained in any act of Parliament passed for the government of the society, and, in the meantime, to such regulations as might be made by a committee of management, it was held—no evidence being given as to the particular objects or tendency of the company—that *the company was to be considered illegal* within the act of 6 Geo. I. c. 18; and that the plaintiff consequently could not maintain his action, as it arose out of an *illegal transaction*. Abbott, C. J., said: “We say, therefore, that dealing in these shares was an illegal transaction; and this being our opinion, every one must observe that the signs of the times require us to declare it without delay. There is another point which I shall notice very briefly,

<sup>1</sup> Buck vs. Buck, 1 Campb. 547.

as it was not touched upon on the argument—viz., that trafficking in these shares may very possibly have been illegal at common-law, inasmuch as it was bargaining and wagering about an act of Parliament to be obtained in future. Upon the whole, I am satisfied that the plaintiff was not in law entitled to maintain his action.”<sup>1</sup>

But in an action of assumpsit for money had and received, the defendant pleaded, as to £94, that after the passing of the 7 and 8 Vict. c. 110, and after the 1st of November, 1844, the defendant, as the Broker and agent of the plaintiff, sold, on account of the plaintiff, fifteen scrip shares in a certain joint-stock company for £94—the formation of which company was commenced after the 1st of November, 1844, and which, at the time of such sale, was a joint-stock company within the provisions of the said act; that is to say, a partnership whereof the capital was agreed and intended to be divided into shares, etc., and not being a banking company<sup>2</sup>—and that the £94 was money received by defendant as proceeds of such sale; it was nevertheless held bad, on demurrer, for not showing that the company was a railway company, the execution of whose works could be carried into effect without the assistance of Parliament, and therefore not within the provisions of the end of the 7 and 8 Vict. c. 110, § 2, *which is in legal effect an exception*. It seems that if the sale *had* been illegal, the defendant, the Broker who negotiated the sale and received the money, had no right to set up the *illegality* of the transaction in answer to an action for money had and received, the purchaser not having insisted on such illegality.<sup>3</sup>

This case, it appears, is to be distinguished from the pre-

<sup>1</sup> *Josephs vs. Pebrer*, 3 Barn. & C. 639; s. c. 1 C. & P. 341, 507.

<sup>2</sup> Negating the excepted cases mentioned in the enacting part of 7 & 8 Vict. c. 110, § 2.

<sup>3</sup> *Bonsfield vs. Wilson*, 16 M. & W. 185. On the latter point, see *Tenant vs. Elliot*, 1 Bos. & P. 3; *Farmer vs. Russel*, id. 296.

ceding cases, as the facts did not bring it within the statute, the court expressly deciding it to be an exception. But an allotter of shares in a completely registered joint-stock company, who has not executed the deed of settlement of the company, cannot, under the provisions of the 26th section of the Joint-stock Companies' Registration Act,<sup>1</sup> *enter into a contract for the sale of his shares*. Hence, where W. E. was the allotter of shares in such a company, *but had not executed the deed of settlement*, his brother, acting under the authority of a power of attorney, desired Messrs. N., Stock-brokers, to sell these shares; and they entered into contracts with purchasers accordingly, but, before the transfers were registered, W. E. became a bankrupt, and the Brokers were obliged, at their own cost, to complete the contracts with the purchasers—the court held, dismissing a petition by the Brokers, claiming to have the bankrupt's shares transferred to them, that, under the terms of the 26th section, the contracts were null and void, and that the assignees of the bankrupt were entitled to the shares as part of his estate and effects.<sup>2</sup>

#### *IV. Origin and History of the London Stock Exchange, and Rules and Regulations thereof.*

I. The London Stock Exchange is a voluntary unincorporated association of persons who deal in securities. It has been in existence about eighty years, and numbers about two thousand members.

On the 9th of May, 1877, a royal commission was appointed by her present Majesty to inquire into the origin and methods of the Stock Exchange. At the head of the commission

<sup>1</sup> 7 & 8 Vict. c. 110.

<sup>2</sup> *Ex parte Neilson*, 3 DeG. M. & G. 556. For cases in which defence was set up that the transactions were against the statutes of betting and gaming, or contrary to the statutes against stock-jobbing, see chapter on "Stock-jobbing."

was Baron Penzance. It consisted of twelve members, prominent among whom was Lord Blackburn. This commission held a large number of meetings, and examined many witnesses, including some of the most experienced Brokers and jobbers in the Exchange. The commission made a full and interesting report on the 31st of July, 1878, and the report made to the commission of the origin of the Exchange, by the secretary of the Committee for General Purposes,<sup>1</sup> is given in this connection as the most authentic history of that body.

The earliest minutes bearing on the subject of the origin of the London Stock Exchange are those of December, 1798, and it appears from these records (in which reference is made to the existence of a Stock Exchange in 1773), and from tradition, that the business of Stock-brokers and jobbers in the public funds was conducted at the end of the last century, not only in the Rotunda of the Bank of England, which was specifically appropriated by the governor and directors for that purpose, but at rooms in the Stock Exchange Coffee-house in Threadneedle Street, to which any person was admitted upon payment of 6*d*. Even at this early date these rooms were known as "The Stock Exchange" or "The House," and there is little doubt that, while the greater part of the business carried on at the Rotunda related to small transactions by the public, and to the immediate transfer of stocks in the books of the Bank, the Stock Exchange rooms afforded a ready market for the operations of the bankers, merchants, and capitalists connected with the floating of the numerous loans raised at that period for the service of the State.

It is on record that the rooms were under the control of a "Committee for General Purposes," the expenses of the management being defrayed by the voluntary subscriptions of the

<sup>1</sup> Mr. Francis Levien (see pp. 3 and 4 of Minutes of Evidence attached to Report of Royal Stock Exchange Commission).

frequenters; and that the functions of this committee were then, as now, judicial as regards the settlement of disputed bargains, and administrative as regards rules for the general conduct of business and for the liquidation of defaulters' accounts. Early in 1801 it became apparent that the rooms did not afford sufficient accommodation for the transaction of the greatly increased business arising out of the creation of loans hitherto unprecedented in amount, and, moreover, that the indiscriminate admission of the public was calculated to expose the dealers to the loss of valuable property. Under these circumstances, Mr. William Hammond and other gentlemen, who had required a site in Capel Court or its immediate neighborhood (described as a central situation), succeeded in raising a capital of £20,000 in 400 shares of £50 each, and in founding a new undertaking, to which the affairs of the old rooms were ultimately transferred. The first stone of the new building was laid in May, 1801. A Committee for General Purposes, consisting of the nine promoters of the scheme and twenty-one other proprietors, was formed; and this body, whose meetings *pro tem.* were held at the "Antwerp" and other taverns in the neighborhood of the Royal Exchange, proceeded to elect members by ballot at a subscription of ten guineas each. A deed of settlement—which, however, was not executed until the 27th of March, 1802—was drawn up; and in this document it was formally recited that "Whereas the Stock Exchange in Threadneedle Street, where the Stock-brokers lately met for the transaction of their business, having been found to be inconvenient," William Hammond and others had upon the site referred to "caused to be erected a spacious building for the transacting of buying and selling the public stocks or funds of this kingdom; and the same is now nearly finished, and is called the Stock Exchange, and is intended to go under that appellation."

It will be further found in that deed that the management, regulations, and direction of all the concerns of the undertaking were vested in a committee, consisting of thirty members or subscribers, to be chosen annually by ballot upon the 25th of March; while the treasuryship and management of the building were placed under the sole direction of nine trustees and managers (separate from the committee) as representatives of the proprietors.

Under these conditions, the new Stock Exchange was opened in March, 1802, with a list of about 300 subscribers. A new deed of settlement was executed in 1876, in which the principles of the original deed have been substantially adhered to.

The Exchange, as at present constituted, consists of two distinct bodies, composed in some degree of the same members, but having different interests.

There are (1) the shareholders, or proprietors, and (2) the subscribers, these latter being generally described as members of the Stock Exchange, or members of the "house." To the shareholders the Stock Exchange is a joint-stock undertaking, the profit arising from the management of which accrues to them as a dividend. They have no rights as *shareholders* to enter the building; and with this class we have no concern in this book.<sup>1</sup>

The Stock Exchange is governed by a "Committee for General Purposes," who are elected by the members. It consists of thirty members, who are elected annually. They appoint their own secretary and the official assignees, and exercise a general control over the mode in which business is transacted in the house and the conduct of its members. The members of the Exchange pay an admission fee of 100 guineas, and a renewal subscription of twenty guineas, unless they have been clerks, in which case they pay sixty guineas as an

<sup>1</sup> Rep. of Royal Stock Exch. Com. 5.

admission fee and an annual subscription of twelve guineas. The Committee for General Purposes have no funds at their disposal, the entrance fees and subscriptions of members being substantially a rent paid to the shareholders for the use of the building.<sup>1</sup>

The rules and regulations of the Exchange are made and altered from time to time by the Committee for General Purposes; and a full copy of the same will be found in the Appendix, to which reference should be had. A synopsis of some of these rules should here be given. The right of entry into the building is strictly confined to members and their clerks. Candidates for admission have originally to be recommended by three members, who each guarantee the sum of £500 in case the new member be declared a defaulter within four years from his admission, and these are balloted for by the Committee for General Purposes. All members of the Exchange, as between themselves, stand in the position of principals; but they can act in the capacity of Dealers and Brokers at pleasure, not being allowed, however, to act in the double capacity at the same time.<sup>2</sup>

The two classes—Dealers and Brokers—in number are about equal. The Dealer remains in the house ready to deal with any one who comes to him. The Broker comes into the house only when he has business to transact.<sup>3</sup> Some of the rules of the London Stock Exchange have been before the courts, and those we shall hereafter specially notice.

As to the power of the association to make rules for the government of its members, it seems to be undoubted; and although there appears to be no direct precedent in England arising out of a contest between the Exchange and one of its members, it is safe to affirm that there will be no difference in this respect between the courts of England and those of the

<sup>1</sup> Rep. of Com. 6.

<sup>2</sup> Rule XL.

<sup>3</sup> Rep. 7.



United States; and that all rules and regulations that are reasonable, and not contrary to public policy or the law of the land, are valid, and will be enforced by the courts.<sup>1</sup> But if a member of an association invokes the courts to defend him against a rule which is shown to be contrary to law, or against public policy, or unreasonable, he will undoubtedly be protected, as is shown by the authorities heretofore referred to.<sup>2</sup>

In respect to suits which may be brought against the London Stock Exchange, there would appear to be no difficulty since the Judicature Acts of 1873 and 1875, and the rules issued under their authority. So far as the form is concerned, in a suit against the "Committee for General Purposes," the proceedings of the association could be reviewed.<sup>3</sup>

But the rules of the Exchange are much more limited in their operation when applied to the rights of third persons not members of the Exchange than when they are used to control the acts of members *inter se*.

This proposition is sustained and illustrated by a recent case in the House of Lords, in which the rules of the Exchange were sought to be used to distribute the property of an insolvent member contrary to the Bankrupt Law.<sup>4</sup> In that case, a member of the Exchange who had been declared a defaulter attended the usual meeting of the Stock Exchange creditors, and gave to the official assignees for distribution

<sup>1</sup> See authorities cited under ch. 2, § VIII. So far as our researches are concerned, the only case that we have found in which a direct contest has arisen in the courts between a member of the Exchange and the general body is that contained in the report of Mr. Scott, one of the members of the London Stock Exchange Commission (p. 30 of Rep.), which is as follows: "Recently the committee of the Stock Exchange were assailed at law by a member whom they had expelled on a charge of dishonorable conduct, the lawsuit being based on the ground that the action of the committee was not justified in law. The trial lasted seven days and proved abortive."

<sup>2</sup> Ch. 2, § VIII., sub. (a.)

<sup>3</sup> 1 Lindley on Part. (4th ed.) 466, 500.

<sup>4</sup> Ex parte Saffery, In re Cooke, L. R. 4 Ch. Div. 555; Tomkins vs. Saffery, L. R. 3 App. Cas. 213.

among his Stock Exchange creditors a check on his bankers for £5000, being about five eighths of his assets, stating at the same time that he had none but Stock Exchange creditors. On the day after this sum had been distributed, the debtor informed the Stock Exchange creditors that his father-in-law claimed to be a creditor for a large amount of money lent. It did not appear that up to this time the debtor had committed any act of bankruptcy, but soon afterwards he filed a liquidation petition, and was adjudged a bankrupt. Upon this state of facts, the House of Lords held that the trustee in bankruptcy was entitled to recover the £5000 from the official assignees of the Stock Exchange. The lord chancellor, in his opinion, held that the rules of the Stock Exchange were rules which, from the very nature of the case, are and must be subject to one infirmity—namely, that if they are to be effectual, they must be applicable to the case of a person who not merely is a defaulter upon the Stock Exchange, but who has no creditors outside the Stock Exchange; because if such a person has outside creditors the general law of the country will step in and give to those creditors rights which those rules cannot take away from them. Therefore, although everything done in the domestic forum of the Stock Exchange may be done according to the rules, and may be most wholesome in its operation for the members of the Stock Exchange, still what is done must be subject to the rights of those who are not amenable to the jurisdiction of the Stock Exchange; and when those higher rights come into conflict with such rules, the latter must give way to the former. It was also held by James, L. J., in the lower court, that any scheme made for the distribution of the assets of insolvents otherwise than according to the bankrupt law is a fraud on such law, and a palpable fraud upon creditors.

But where a Broker becomes a defaulter in accordance with

Rule 142 of the Stock Exchange, and thereupon the official assignee fixes the market price, and collects differences due to the defaulter from other members, to be set off and paid to those members to whom, on the same footing, differences are due from the defaulter, it was held that the trustee in liquidation could not recover the sum collected from the official assignee.<sup>1</sup> The court distinguished the case from *Tomkins vs. Saffery, Baggallay*, L. J., saying: "As far as regards any losing contracts, entered into by Plumbly [the defaulting Broker], the trustee in bankruptcy or in liquidation is relieved from that; and if, on the other hand, it is said that there may be some winning contracts, the answer as far as regards them is, that it would be impossible to realize on them, because, when the time arrived for the completion of the contract, Plumbly could not and would not have been ready to perform them."<sup>2</sup>

The question as to how far the rules of the Stock Exchange enter into contracts made for a principal through its members is discussed in the chapter on "Usages;" and as there seem to be no direct precedents which are peculiarly applicable to Stock-brokers in England, the reader is referred to the second chapter, where the rules, regulations, and general character of unincorporated Stock Exchanges are considered.

<sup>1</sup> In *re Plumbly*, 42 L. T. (n. s.) *Nicholson vs. Gooch*, 5 El. & Bl. 999. 387. Also Ch. II. § VIII. for American

<sup>2</sup> See also, in this connection, decisions.

## CHAPTER V.

ANALYSIS OF TRANSACTION BETWEEN BROKER AND CLIENT  
UPON PURCHASE OR SALE OF STOCKS ON LONDON STOCK  
EXCHANGE.

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*I. Definitions.**II. Trading "for Money."**III. Trading "for the Account."**IV. Relation of Broker to Client.**(a.) Ownership and Disposition of Securities when Purchased.**(b.) Summarily Closing Transaction.**(c.) Other Incidents of Relation.**V. Relation between Client and Jobber.**(a.) General Liability of Jobber to Client.**(b.) Special Contract between Jobber and Client Guaranteeing  
Registration.**(c.) Liability of Client to Jobber.**VI. Relation of Client to Undisclosed and Intermediate Pur-  
chasers.**VII. Relation between Selling Client, or Vendor, and Ultimate  
Purchaser; Transferror and Transferee.*

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*Analysis of Transaction between Broker and Client upon  
Purchase or Sale of Stocks on London Stock Ex-  
change.*

WE propose now to analyze an ordinary transaction in stocks, as carried on through the London Stock Exchange.

There are Stock-brokers who are not members of the Exchange,<sup>1</sup> but it is not of that class that we here mean to speak, except to remark incidentally that a sale or purchase of securities through a Stock-broker, effected and consummated outside of the Exchange, would ordinarily be in no-wise different in its legal aspect from a sale or purchase of any other kind of property through an agent or Broker.

As we have already seen, operations in the Exchange are conducted through two classes of its members—viz., “Brokers,” and “Dealers” or “Jobbers.”

Brokers are those members who buy and sell securities for the public for a compensation called a commission.

Dealers or Jobbers are those who deal, make terms, or speculate in the “house” for their own account.

But these characters of Brokers and Jobbers are not invariable and uniform. The members of the Exchange may change them at pleasure, and a Broker may become a Jobber, and *vice versa*; but it seems that they cannot act in a double capacity in the same transaction.<sup>2</sup>

### *I. Definitions.*

In the outset, it will be well to define some phrases that are peculiarly applicable to the dealings on the London Exchange, referring the reader for others to another part of the work,<sup>3</sup> where those terms are defined which are alike applicable to England and the United States. The terms “bull,” “bear,” “put,” “call,” and “options” are used as substantially synonymous in both countries.<sup>4</sup>

A “lame duck” is one who cannot meet his engagements. Frequently an arrangement is made to continue shares, i. e., postpone delivery or payment until the next settling-day,

<sup>1</sup> Rep. of London Stock Exchange Com. 1878.

<sup>2</sup> Rule 40, London Stock Exchange.  
<sup>3</sup> P. 116.

<sup>4</sup> See p. 116.

which is performed by the payment of a premium called, in the case of a seller, "backwardation;" in that of a buyer, "contango." The terms "contango" and "backwardation" have been fully explained in several adjudications, as well as before the royal commission to which allusion has already been made.

These latter terms grow out of an indisposition on the part of persons entering into transactions on the Exchange to close the same on the account-day for which they are made. The market may be unfavorable, or some other cause may arise rendering it desirable to carry the operation over to the next account-days, in which event the transactions are continued by the operation of "contango" or "backwardation," as the case may be. The manner in which this is done is given in detail in the notes.<sup>1</sup>

<sup>1</sup> The following extract is taken from an excellent practical treatise on the law and customs of the London Stock Exchange, by Melsheimer and Laurence, London, 1879, p. 10: "If, however, the market should tend unfavorably, or if for any other reason it should be found desirable, an arrangement may be made to postpone the completion of the contract until the following settling-day. This is called 'continuation' or 'carrying over,' and is practically effected, we will suppose, by the bull or speculative buyer as follows: The vendor of the stock (in consideration of a payment made to him by the buyer) enters into two contracts with the buyer—one a contract for the purchase of the same amount of stock as he has contracted to sell (such contract to be completed on the settling-day, so as to cancel the subsisting contract), and the other a fresh contract for the sale of the same amount of stock, to be completed on the subsequent settling-day. The result is, that the vendor and purchaser stand in precisely the same position as if there had been

no previous contract (except as regards payment of the consideration), because the difference between the original contract price and the price at which the carrying-over is effected must be paid at once—that is to say, on the settling-day. The nominal price of the security at which the carrying-over is effected would obviously be quite immaterial to the parties, since the two contracts balance one another, were it not that this difference is payable immediately. Being payable immediately, more bargaining would become necessary to fix the price for the new contracts; but this is obviated by the publication of a list of 'making-up prices,' which are, in round figures, the approximate values of all the recognized securities on that day, as settled by the clerks of the house in the various markets, and are usually based upon the average price of the first two or three hours of the day. In case of any dispute as to the making-up prices, or of any omission in fixing them, the clerk acts upon the decision of two members of the committee. All continuations

But, practically, the terms "backwardation" and "contango" mean that a new operation is begun each settling-day,

must be effected at these prices, or, where no such prices have been fixed, at the then existing market price.

"The consideration thus paid by the buyer, for which the vendor agrees to postpone the delivery of the stock he has sold to a future specified date, is called a 'contango;' on the other hand, a 'backwardation' is the premium paid by a seller of stock for the privilege of postponing his delivery of such stock from and to a specified date.

"Inasmuch as the vendor and purchaser stand in the same position after the continuation as if there had been no previous contract, the continuation may equally be effected between persons other than the parties to the previous contract, and this is frequently the case. Let us suppose that a 'bull account' exists in the particular stock with which we have to deal—that is, that the amount of stock bought for the settlement is greater than the buyers are prepared to take up (we may here premise that every bargain in the stock must be and is settled on the account-day); a person who has bought stock for which he is unable or unwilling to pay must then find some one who, for a consideration, is willing to stand in his place by taking up such stock at the making-up price, and holding it for a specified time, charging a rate of interest for the money employed, and holding the stock as security; the real buyer engaging, at the end of that time, to take possession of the stock by repayment of the money.

"The continuation may, of course, be effected outside the Stock Exchange; but, for its more easy explanation, we will suppose that a purchaser has given his Broker instructions to continue the stock for which he is liable to pay, and that

the Broker carries out the transaction with a member of the house. This carrying-over is, as we have seen, not necessarily effected with the dealer from whom the original purchase was made, though this is very generally the case; but the Broker finds some dealer in this stock who has money to employ, or who is out of the stock, and agrees with him for the accommodation at the market rate. The Broker then renders a contract to his Client, showing the sale of his stock at the making-up price for the current account, and its repurchase for the next account at the same price, but with an addition representing the value of the money practically borrowed by his Client, together with the monetary consideration, if any, for the accommodation; and, in the case of registered securities, if the lender of the money is obliged to take them into his own name, this will include the cost of stamps and transfer-fees, from the payment of which the Client is *pro tempore* relieved. It is this difference between the price of sale for the current account and the actual buying price for the next account which is called a 'contango;' and this, as will be easily seen, will be regulated partly by the nature of the security, partly by the value of money, and partly by the demand existing for such accommodation; and will also be affected by the individual credit of the person seeking the accommodation.

"Conversely, let us suppose a 'bear account' to exist in the stock; here the amount of stock sold for the settlement is greater than the sellers are able to deliver, and the bear will have to find some one who, for a consideration, is willing to supply the stock which will enable him to complete his bargain. There are three

because the loss is settled and paid by the Client on each of those periods.

## *II. Trading "for Money."*

Sales or contracts on the Exchange are either made "for money" or "for the account."

A contract "for money" is one for immediate execution; the securities are delivered by the selling Broker at once upon their sale by a transfer to a designated name, and the Jobber or Broker for the buyer thereupon immediately pays for the same.

These contracts are not numerous, and are generally confined to consols.<sup>1</sup> In this transaction, in respect to both the selling and purchasing Brokers, the relation they bear to their Clients is that of pure agents. And the agent is entitled

classes of persons who will be able to render the bear this assistance; first, the speculative buyer, who is unable to complete his bargain, and is therefore anxious to continue; secondly, the buyer who, though able to complete his bargain, is willing, for a consideration, to defer such completion to a future day; and, thirdly, in the last resort, the genuine holder of stock, who is willing to accept a premium for the loan of his stock for a specified time. In these cases, the Broker, having similarly effected the continuation, renders a contract to his bear Client, showing the purchase of his stock at the making-up price for the current account, and its resale for the next account at a lower price. The difference between these prices is called 'backwardation,' and represents the premium paid by the bear for the loan of the stock, *less* the value of the money which is here supposed to be advanced by the bear; and here again this amount may include the cost of stamps and transfer-fees, which will

be payable by the holder who lends his stock, on its retransfer to him.

"It will be observed, therefore, that it does not necessarily follow either that the buyer will have to pay *contango*, or the seller *backwardation*, when they are desirous of carrying over their stock; for if the former has bought for an account at which it is found that more of the stock has been sold than can be delivered, he will be in a position to postpone payment, and at the same time to receive *backwardation* for the temporary loan of the stock which he has bought; and, conversely, in the case of a bull account, the latter may receive *contango* for postponing the delivery of stock sold."

Consult also, in this connection, *Sheppard vs. Murphy*, 16 W. R. 948; see also evidence attached to Report of London Stock Exchange Commission, where full explanation of the operations of "*contango*" and "*backwardation*" are given.

<sup>1</sup> See Rep. of Stock Exchange Com.



to full indemnity for any act which he does in the business of his Client, provided there is no fraud or neglect on his part. For instance, if the former order the Broker to sell securities, which he does, and the Client neglects or refuses to furnish the same for delivery, and by reason of such failure the Broker is compelled to make good the difference, in this case the Client is bound to indemnify him.<sup>1</sup> So where a Broker, being instructed to buy certain shares, bought letters of allotment, and it was in evidence that these passed on the Stock Exchange as shares, it was held that the jury might find the order to have been fulfilled,<sup>2</sup> and that the Broker had fully performed his duty by buying what passed on the Exchange as shares.

Again, if the Broker advances from his own funds all or any portion of the money to pay for the securities, he has a lien upon them to that extent, and the relation of pledgor and pledgee is added to the previous one of Broker and Client.<sup>3</sup> In a word, the relation of principal and agent being once established, it follows that the Broker is clothed with all of the attributes of that character; and as all of the decisions in which contests have arisen between Stock-brokers and their Clients, both in England and in the United States, have been already set forth, it is only necessary in this connection to direct a reference to that part of the work where they are collected.<sup>4</sup>

### *III. Trading "for the Account."*

But by far the most numerous transactions on the London Stock Exchange are those "for the account," and it is in such

<sup>1</sup> Child vs. Morley, 8 T. R. 610;    <sup>3</sup> Brookman vs. Rothschild, 3 Sim.  
Lightfoot vs. Creed, 8 Taunt. 268; 153; aff'd 5 Bli. (n. s.) 165.  
Pollock vs. Stables, 12 Q. B. 765.    <sup>4</sup> Ch. III.

<sup>2</sup> Mitchell vs. Newhall, 15 M. & W.  
308.

tradings that the Broker seems to lose the attributes of an agent and to assume the garb of a principal.

The following history of an ordinary stock transaction "for the account" is substantially taken from a leading case, and it illustrates with great detail the whole course of the business.<sup>1</sup>

When a Broker is instructed by his Client to sell shares on his own account, he goes on the Stock Exchange and deals with either a Jobber or another Broker, as the case may be. In case a Broker deals with a Jobber, he asks the Jobber for the price ("to make a price") of a particular class of shares, without saying whether he (the Broker) desires to sell or buy. The Jobber then names two prices to the Broker—the one that at which he will buy, the other that at which he will sell.

If the Broker be willing to sell at the price named, he declares to sell, and accepts the offer of the Jobber to buy at that price.<sup>2</sup> Thereupon the bargain is concluded between them.<sup>3</sup>

The bargain is made for a certain specified day, which is known on the Stock Exchange as the "account-day;" and on the day preceding the account-day (which latter day is known as the "name-day") the Jobber is bound to pass to the Broker

<sup>1</sup> *Maxted vs. Paine*, L. R. 4 Ex. 205.

<sup>2</sup> The Broker is not bound to disclose his principal (*Child vs. Morley*, 8 T. R. 610; *Magee vs. Atkinson*, 2 M. & W. 440).

<sup>3</sup> A bought or sold note is then given to the principal, on which the name of the Jobber is occasionally inserted, though this is by no means a universal custom. The names of the Jobbers purchasing were inserted in the notice contained in the case of *Torrington vs. Lowe*, L. R. 4 C. P. 26.

The bought and sold notes are in the following form, *mutatis mutandis*:

Bought for William Murphy, Esq.,  
100 Overend Gurney shares  
at 1½ discount.....£1387 10s. 0d.  
(£15 paid) stamps.....7 2s. 6d.  
Brokerage.....12 10s. 0d.  
£1407 2s. 6d.

For 27th April.

No. 7 Finch Lane, E. C., 21st April, 1866.

For Lowndes, Sursey, & Wooley, Brokers.  
(Signed) J. S. BYWATER.

(*Sheppard vs. Murphy*, 16 W. R. 948.)  
The sold note is as follows:

2 Royal Exchange Building, May 24, 1866.

Sold by order and for account of E. P. Maxted, Esq., 100 Overend, Gurney, & Co. shares at 17 discount. For the 30th inst.

SANDEMAN, DOBREE, & Co.

(*Maxted vs. Paine* (2d action), L. R. 4 Ex. 203, 210.) But usually no document passes between the Broker and Jobber; each one, however, makes a memorandum of the transaction in his own book.

the name of a person or persons (as the case may be) as the ultimate purchaser or respective purchasers of the said shares; but the Jobber may in lieu thereof give his own name to the Broker as the ultimate purchaser of the shares; or, in the event of his having had no dealing with the shares subsequent to the original bargain, then as the purchaser of the shares, in which latter case he is bound himself to take the same.

This name is passed upon a document called a "ticket," which is in the following form, *mutatis mutandis*:

£15 paid, 1 13-16 discount.....	£131 17s. 6d.
Stamp .....	0 15s. 0d.
	<hr/>
	£132 12s. 6d.

Ten shares Overend, Gurney, & Co.

Francis Peppercorn, of West Street, Hertford.

30 May, 1868.

Watson, Cowell, & Co. pay.

The dealings in the shares after the concluding of the first bargain may have been either many or few, but in all cases the ticket is endorsed, either in pencil or ink, with the names of the members of the Stock Exchange, whether acting as principals or Brokers, through whose hands the ticket has passed. In addition to his obligation to give the name or names aforesaid, the Jobber is also liable to the Broker for the price of the shares as agreed upon; and the Broker can either apply for the price to the Jobbers, or can apply to the Broker of the ultimate purchaser for the amount of the purchase-money which he is to pay for the shares, looking to the Jobber for the difference, if any. But the usual practice is to make application in the first instance to the Broker of the ultimate purchaser whose name appears on the ticket as the person to pay, as shown on the above form of ticket.<sup>1</sup>

<sup>1</sup> The payment for the stock is made by the paying Broker in notes of the Bank of England or coin, if notice is given to him to that effect before eleven o'clock on the day of settlement; in the absence of such notice, a member is bound to accept the crossed check of another member (Mocatta vs. Bell, 27 L. J. Ch. 237).

In the event of the Jobber failing to give a name by two o'clock on the name-day, the Broker has the right, after the lapse of an hour, to sell out the shares as against him by auction on the Stock Exchange through the medium of another Broker, who is, however, in most instances the secretary or clerk of the Stock Exchange. The Jobber then becomes liable to the Broker for the difference (if any) between the price at which the shares are so sold and the price originally bargained for between the Broker and Jobber. At any time before the transfer of the shares has been executed by the seller,<sup>1</sup> the Broker may object to any name or names given by the Jobber; and in the event of the Jobber and Broker failing to agree, the Broker may appeal to the committee of the Stock Exchange, who on such appeal have the power to require the Jobber to give to the Broker a better name, in case they consider the Broker to be thereunto entitled.<sup>2</sup>

So if the Broker wishes to secure the registration of the shares and the exoneration of his Client from all future liability in respect of the same, he makes a special bargain with the Jobber in express terms to that effect; but in that case the price offered by the Jobber is often considerably below the price which he would otherwise have offered. But this guaranteeing of registration is of rare occurrence.<sup>3</sup>

It also appears in accordance with the usages of the Stock Exchange that the Broker may, in executing the order of a Client, enter into a contract for the specific amount of stock ordered to be bought or sold, or may include such order with others he may have received in a contract for the entire quantity, or in quantities at his convenience.

<sup>1</sup> By Rule 98, registered shares or stock, if not delivered within ten days, may be bought in against the seller.

<sup>2</sup> *Maxted vs. Paine*, L. R. 4 Ex. 205.

<sup>3</sup> *Maxted vs. Paine*, id.; *Cruse vs. Paine*, L. R. 4 Ch. App. 441; *Coles vs. Bristowe*, id. 3.

Neither in Stock Exchange contracts is there any real appropriation to any particular Client of any particular stock in any transaction entered into with the Jobber. Each transaction only forms an item in an account with that Jobber, or, more correctly, with the house generally—that is to say, specific delivery or acceptance of that amount of stock is not necessarily made; but the transaction is liable to be balanced at any time during that account by a counter-transaction by the same Broker on behalf of the same or any Client, or even on his own behalf, so that the balance only of all purchases and sales of that particular stock made by the Broker in the house generally is to be finally accepted or delivered by him, and this through the instrumentality of the clearing-house and the system of tickets.

On the usual settling-days, the members of the house balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals; or if their principals refuse to accept or deliver, then sell or buy against them, as the case may be, and charge them with the loss, if any; or if delivery is not required on either side, then any difference which may result from a rise or fall in the market is paid by the one to the other.<sup>1</sup>

<sup>1</sup> "An important extension of the clearing principle was effected by the establishment in 1874 of the London Stock Exchange Clearing-house, which undertakes to clear, not sums of money, but quantities of stock. As Stock-brokers settle their transactions only once a fortnight, or in consols once a month, it naturally arises that in the intervals the same Broker will usually have bought the same kind of stock for one Client and sold it for another. The very same stock may have passed through several different hands, and the same Brokers may have had reciprocal dealings with each other. Instead, then, of actually making transfers of stock for each transaction and paying by checks, which greatly swell the business of the Lombard Street Clearing-house on settling-days, a plan has been arranged according to which each member of the clearing-house prepares a statement of the net amount of each stock which he has to receive from or deliver to each other member. The manager of the house, after verifying these accounts, which should balance in the aggregate, directs the debtor members to transfer quantities of stock to the creditor members in such a way as

The following extract from the report of the London Stock Exchange Commission in 1878, which is based upon the testimony of many experienced Brokers, is confirmatory of the transaction as described in the cases before referred to: "As soon as the contract is made, it is usual, but not universal, for each party to make a note of it in his own note-book; but no written contract passes between them." The Broker who has acted for his Client in making such a contract sends a written note of it to the Client; but as a rule he does not mention the name of the dealer with whom he has dealt.

There are two fixed days, called account-days, in every month, for stocks other than government stocks, these latter being settled only once a month.

When the account-day arrives, the securities are delivered and paid for, unless some fresh bargain is made by which the execution of the contract is annulled or practically deferred until the next account-day.

If the bargain, however, is completed on the original account-day, it is not necessarily carried out between the original parties to it; for the seller may have bought similar stock

to close all the transactions. It will be noticed that for pretty obvious reasons the transfers are made in the Stock Exchange directly from Broker to Broker, and not to the manager of the clearing-house, as in banking transactions. A separate clearing has, of course, to be made in each kind of stock. It is found that the quantities actually transferred do not exceed 10 per cent. of the whole transactions cleared, and the checks drawn are diminished on settling-days as much as ten millions sterling" (Jevons's *Money and the Mechanism of Exchange*, pp. 281, 282). See also, as to method of transacting business on the London Stock Exchange, an article on *The Legal Relations between a Stock-broker and his Cus-*

*tomor* in the 5 *Law Mag. and Rev.* 401 (Aug. 1880, 4th series), and the following cases: *Lacey vs. Hill* (Scrimgeour's claim), L. R. 8 Ch. App. 922; *Maxted vs. Paine*, L. R. 4 Ex. 203, and 6 id. 132; *Bowring vs. Shepherd*, L. R. 6 Q. B. 309; *Grissell vs. Bristowe*, L. R. 4 C. P. 36, and 3 id. 112; *Coles vs. Bristowe*, L. R. 4 Ch. App. 3, and L. R. 6 Eq. 149; *Sheppard vs. Murphy*, 16 W. R. 948; *Rennie vs. Morris*, L. R. 13 Eq. 203; overruled by *Merry vs. Nickalls*, L. R. 7 Ch. App. 733, and L. R. 7 H. L. Cas. 530; *Nicholson vs. Gooch*, 5 El. & B. 999; also *Lindley on Part.* (4th ed.) 721, which contains a valuable summary of the law upon the subject of sales on the Stock Exchange; *Cavanagh's Law of Money Securities*, 513 et seq.

from some third person, and he in like manner from another, and so on through several hands, so that the whole series of bargains is settled by the ultimate seller delivering to the ultimate buyer.

If, when the account-day arrives, the seller is not able to deliver the stock which he has sold, the buyer is entitled, after a certain lapse of time, to "buy the stock in" against him. This proceeding consists in an official Broker announcing in the market that he wants the given quantity of stock, together with the purpose for which he wants it. The original seller has to pay the difference in price. Similar practice prevails with regard to "selling out" in the case of non-acceptance by the buyer.

All disputes or charges of unfairness between Brokers are referred at once to a committee, who dispose of the matters in controversy with the utmost promptitude.

The Dealers constitute a class which is a distinctive feature of the London Stock Exchange. They are ready, at a moment's notice, and, in cases where required, even to pay for at a moment's notice, almost any quantity of a current security, with the knowledge that they can perhaps within the same day, or, at any rate, before the next account-day, sell the same again at a margin of profit which is involved in the difference between the two prices that they named, and they act without hesitation upon this facility.

The securities dealt in on the Exchange are distinguished into "current" and "non-current." It is only in the "current" securities that the dealer can "make a price;" in the other class the sale is effected by bargains between the members, generally conducted through a middleman also a member.

*IV. Relation of Broker to Client.*

In the above transaction, the identity of the Client seems to be entirely lost sight of, and the settlement of the contract by the payment of differences, by which the delivery of stocks is avoided, renders the transaction radically and wholly different from the ordinary case of a Broker acting in the purchase or sale of merchandise.

But, notwithstanding this dissimilarity, the rule in England is, as in the United States, to hold the Stock-broker to all the responsibilities, and to invest him, on the other hand, with all of the privileges, of an agent.<sup>1</sup>

For it appears in all of these transactions that the fundamental elements of agency exist—viz., that the Broker makes the contract or enters into the business for his Client, and not for his own account; and the fact that his own money or credit is used in the business, and his principal's name concealed or disregarded, is of no importance. These, and all of the other incidents of the trading, exist mainly by virtue of the rules of the Stock Exchange, and are mere ramifications of the business, and do not affect the ultimate relation which the parties bear to each other.<sup>2</sup>

But the position has been taken extra-judicially in England,<sup>3</sup> that the Stock-broker was a principal, and that he should be regarded as agreeing himself with the Client as principal, from the inception to the close of the transaction, it being argued that the transactions would then assume their real shapes—viz., as mere contracts for differences, and consequently void as gaming contracts.

But, in the absence of some express agreement between the

<sup>1</sup> Thacker vs. Hardy, L. R. 4 Q. B. 58; 4 Jur. 172; Lacy vs. Hill, L. R. 8 Div. 685.

<sup>2</sup> Mortimer vs. McCallan, 6 M. & W.

<sup>3</sup> 5 *Law Mag. and Rev.* (Aug. 1880) 401, 4th series.



Broker and Client (and in stock transactions on the London Exchange such an agreement has never been shown to exist), this view cannot be maintained, and is very strongly repudiated in the interesting case of *Robinson vs. Mollett*,<sup>1</sup> which holds that a Broker cannot be a principal in a transaction where he is employed to act as Broker. The facts in that case were these: A merchant gave two certain orders to the defendants, tallow-brokers, to buy tallow; the first of the orders was "to buy for him 50 tons of tallow, June delivery, at 46s. 6d.;" the second was, "Buy 200 tons of tallow for June, best terms." Upon the receipt of these orders, the Brokers immediately sent notes, saying, "We have this day bought for your account," and signed them with the addition of the words "M. B. & U., sworn Brokers." The price of tallow fell in the market between the dates of the orders and the time for the June delivery.

On the trial, it appeared that the Brokers did not buy, and had not, at the time of sending the notes to their principal, bought, the specified quantities from any person; but, both before and after the order, had bought from various persons, in their own name, larger quantities of tallow, proposing to allot to their principal the quantities he had desired to be bought. The principal refusing to accept the tallow which the Brokers tendered, the latter brought suit to recover the difference. The Brokers had judgment in the Common Pleas, which judgment stood affirmed, through an equal division of opinion among the judges in the Exchequer chamber.

On the trial they rested their right to recover upon a custom which they proved to exist in London, for tallow-brokers, where they receive an order from a principal for the purchase of tallow, to make a contract or contracts in their own names without disclosing their principals, and also to

<sup>1</sup> L. R. 7 H. L. Eng. & I. App. Cas. 802.

make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the selling Brokers, as above described in the present case, and passing to their principals a bought note for the specific quantity ordered by them as before described in this case; and that when a Broker so purchases in his own name, he is personally bound by the contract; and that on the usual settling-days the Brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be; or, if the latter refuse to accept or deliver them, to sell or buy against them, as the case may be, and charge them with the loss, if any; or if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other. This custom does not exist at Liverpool, and was unknown to the defendant. But the whole of the transactions and dealings in the present case were carried out in accordance with this custom.

The House of Lords reversed the judgment of the court below, and opinions were delivered by several judges, the novelty and importance of the question justifying extracts therefrom.

Mr. Justice Mellor said, adopting the language of the court below: "It appears to me to amount to a custom for a Broker in the tallow-trade in London to do something entirely inconsistent with the character of a Broker—viz., to convert himself from an agent to buy for his employer into a principal to sell to him. . . . It is an axiom of the law of principal and agent that a Broker employed to sell cannot himself become the buyer; nor can a Broker employed to buy become himself

the seller without distinct notice to the principal, so that the latter may object if he think proper. A different rule would give the Broker an interest against his duty. . . . Although a custom of trade may control the mode of performance of a contract, it cannot change its intrinsic nature."

Mr. Justice Brett, in the course of his opinion, said that a custom, so long as it did not infringe some fundamental principle of right or wrong, may prevail; but if it is found to be fundamentally unjust to the other side, if sought to be enforced against a person in fact ignorant, it is unreasonable, contrary to law, and void. "The relation between the plaintiffs and defendant, established by these orders of the defendant (in error) and their acceptance by the plaintiffs (in error), was that of principal and agent—a merchant principal and a Broker agent. . . . And whatever view may be taken of the effect of the custom if allowed, it must go to the extent either of making a contract of purchase and sale between the plaintiffs and defendant, or of absolving the plaintiffs from an obligation to make a contract for the defendant—that is to say, to make a contract for the purchase of tallow to which he should be a party as purchaser, and some person or firm bound by the plaintiffs should be a party seller." In conclusion, he said: "I fail to see any advantage to the merchants who employ the Brokers adequate to the loss of a carefully selected principal. It is a custom, therefore, invented by the body of Brokers for their own exclusive advantage."

Mr. Baron Cleasby, another of the prevailing judges, said: "The vice of the usage set up in the present case cannot be appreciated by examining its parts separately. It must be looked at as a whole, and its vice consists; I apprehend, in this: that the Broker is to make the contract of purchase for another, whose interest as buyer it is to have the advantage of every turn of the market; but if the Broker may eventually

have to provide the goods as principal, then it becomes his interest as seller that the price which he is to receive should have been as much in favor of the seller as the state of the market would admit. Thus the two positions are opposed."

The reasoning of this case cannot but fail to meet the approval of the profession; and the adoption of any other rule would leave in the hand of the Broker untold means of fraud upon a person who was paying him a commission for the exercise of his disinterested skill, diligence, and zeal.<sup>1</sup>

The case of *Merry vs. Nickalls*\* should also be referred to in this connection, where it was held that upon a sale of shares on the Stock Exchange the ultimate contract is not between the vendor's Broker and the purchaser's Broker, but between the vendor and the purchaser named on the ticket who are brought together by means of the Jobber.

Another class of cases may also be profitably referred to as confirming the view that, in all stock transactions where a Broker is acting under a commission, the courts hold the relation to be that of agency.

The cases we allude to are those in which the question arises as to the respective liability of persons buying or selling through the Stock Exchange for "calls;" for when the ticket containing the name of the ultimate purchaser issued by his Brokers is delivered to the vendor (by his Broker), and he has executed a transfer of his shares, and that transfer has been accepted by the purchaser, and he has paid the price, the purchaser is bound to indemnify the vendor against all liability in respect of the shares,<sup>2</sup> although the purchaser has not

<sup>1</sup> See also, in this connection, *Story* *kinson vs. Kelly*, L. R. 6 Eq. 496; on Ag. § 210; also *Thacker vs. Hardy*, L. R. 4 Q. B. Div. 685.

<sup>2</sup> L. R. 7 Ch. App. 733; aff'd L. R. *Gillespie*, L. R. 5 Eq. 293; *Sheppard* H. L. 7 Eng. & I. App. Cas. 530.

<sup>3</sup> *Paine vs. Hutchinson*, L. R. 3 Eq. W. R. 948; *Wynne vs. Price*, 3 De G. 257, and L. R. 3 Ch. App. 388; *Hodg- & Sm.* 310.

executed the transfer,<sup>1</sup> and where the registration of the transfer cannot take place by reason of the stoppage of the company<sup>2</sup>—it being held that a privity exists between the vendor and the ultimate purchaser the moment the ticket containing the purchaser's name has been handed by his authority to the vendor, and he has accepted the name and indicated the acceptance to the purchaser.<sup>3</sup> It has also been held that undisclosed principals are liable—viz., that if the first purchaser is a Broker buying for a principal, the liabilities of such principal are the same as the liabilities of a purchasing Broker or Jobber.<sup>4</sup>

To sum up this proposition, we find: First, that the Broker is ordered to buy or sell by his Client on the Stock Exchange. The Broker does not offer, or profess to offer, his own securities for sale. Second, the Broker goes into the Stock Exchange, and there makes the transaction with a Jobber or fellow-Broker. Third, the loss or profit of the transaction is the Client's. Fourth, the Broker acts for a commission. Fifth, he renders a statement of the business in his capacity as Broker to his Client.

So far as the Broker's relation to his Client is concerned, there would seem to be no difference between a trading "for money" or "for the account;" and altogether there appears to be nothing in a speculative transaction in securities which authorizes the position that the Broker is a principal.<sup>5</sup>

<sup>1</sup> Wynne vs. Price, *supra*.

<sup>2</sup> Evans vs. Wood, L. R. 5 Eq. 9; 328; Davis vs. Haycock, L. R. 4 Hodgkinson vs. Kelly, 6 id. 496; Exch. 373, 384, 386; Maxted vs. Holmes vs. Symons, 13 id. 66; comp. Paine, L. R. 6 Ex. 132, 166.

<sup>4</sup> See Lord Blackburn's opinion in Maxted vs. Paine, *supra*.

<sup>5</sup> For further consideration of this subject, see chap. on "Stock-jobbing" under title of "Wagers."

<sup>3</sup> See cases heretofore cited: Bow-

*(a.) Ownership and Disposition of Securities when Purchased.*

This brings us to another phase in the transaction—viz., that, although the Client orders particular securities to be bought for him upon the Exchange, and a contract is accordingly made for them by his Broker, there is no immediate delivery, and in fact they do not become the property of the Client until the transaction is closed by the delivery of the securities to the Broker.

This point was involved in *Lacey vs. Hill*,<sup>1</sup> where a Broker summarily closed an account of his Client before the settling-day, and sought to recover the loss made by so doing from the latter's estate.

In that case it was stated upon this point that "when a Broker, on the instructions of his principal, agrees to buy, or actually buys, a certain amount of stock or shares, the stock or shares so bought *are in nowise identified as the stock or shares so ordered to be purchased, but remain, by the practice of the Stock Exchange, the property of the Brokers, and at their disposition*, not at that of their principal. When the transaction as between the Brokers and the principal is completed by payment by the latter and by delivery of the stock, the particular stock becomes the principal's property, and is treated and considered as the subject of the bargain, and the Brokers, according to the practice, are thereupon bound to hold the particular stock or shares at the disposal of the principal."<sup>2</sup>

When, however, the stock has been paid for by the Client, but remains in the custody of the Broker; or where the Broker advances the purchase-money, or a portion of the same, as was done in *Brookman vs. Rothschild*,<sup>3</sup> it would seem that

<sup>1</sup> *Scrimgeour's Claim*, L. R. 8 Ch. App. 921, 922.

<sup>2</sup> See also *Lacey vs. Hill* (*Crowley's Claim*), L. R. 18 Eq. 182.

<sup>3</sup> 3 Sim. 153, aff'd in H. L. 5 Bli. 165.

all of the law applicable to the ownership of the property attaches. The Broker can make no disposition of it without the consent of the owner; he is bound to retain the actual stock or shares transferred, and not to retransfer other stocks or shares bought at a lower price, and thus make a profit out of them.<sup>1</sup> And although Brokers are within the list of traders in the Bankruptcy Act of 1861, and the first schedule to the act of 1869,<sup>2</sup> yet in the event of such bankruptcy a sum of stock or shares which the Broker has bought for his principal and taken into his own name are not in his order and disposition so as to pass to his assignees or trustee.<sup>3</sup> The court held in the last-cited case that the property of a principal intrusted by him to his factor or Broker for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified and distinguished from all other property; and that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And the court further laid down the general principle that if the property, in its original state and form, was covered with a trust in favor of the Client, no change of that state and form can divest it of such trust, or give the factor or agent, or those who represent him in right, any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The

<sup>1</sup> This was so held in the case of 4 Ch. App. 402). As to the custom a mortgage of stocks (*Langton vs. in the United States of Brokers using Waite*, L. R. 6 Eq. 165). But, after securities held for account of their the mortgagor has discovered the Clients, see Ch. III. p. 141 et seq. fact, he may deprive himself of any  
<sup>2</sup> *Taylor vs. Plumer*, 3 Mau. & S. 562.  
<sup>3</sup> *Id.*  
remedy by dealing with the property so retransferred to him (*id.* L. R.

case of *Taylor vs. Plumer* was directly endorsed in the case of *Ex parte Cooke*.<sup>1</sup> In that case, C., a trustee, employed a Stock-broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock. The Broker sold the consols for cash, bought railway stock to the same amount for the settling-day, and received the price of the consols in a check, which he paid into his account at his bankers. He stopped payment before the settling-day, and went into liquidation. The trustee claimed so much of the Broker's balance at his bankers as was attributable to the price of the consols. This was refused by the registrar, on the ground that the transaction constituted the relation of debtor and creditor between C. and the Stock-broker, and not that of trustee and cestui que trust.

But this decision was reversed on appeal, the appellate court holding that the Stock-broker had notice that the money belonged to a trust fund, and that the money could be traced.

And the court also expressly said that, even if there had been no notice, the relation of the Stock-broker and C. was of a fiduciary character, so as to make the case undistinguishable from *Taylor vs. Plumer*.<sup>2</sup>

### *(b.) Summarily Closing Transaction.*

The case of *Lacey vs. Hill*<sup>3</sup> established another proposition which should be touched upon—viz., that when it appears to the Brokers that their Client is, from insolvency, bankruptcy, or death, unable to carry out his contracts, the Brokers may summarily close the account before the next settling-day

<sup>1</sup> In re Strachnan, L. R. 4 Ch. Div. 123.

<sup>2</sup> See further on the subject of commingling proceeds, and right of cestui que trust or principal to follow

trust property, elaborate note to *Holley vs. Gieve*, 9 Ab. (N. Y.) New Cas. 8, at 41.

<sup>3</sup> *Scrimgeour's Claim*, supra.



has arrived, taking their chances, nevertheless, that the price of the securities will be as unfavorable to their Client on the settling-day as it was on the day they closed the transaction.

In that case, Messrs. S. were Brokers on the London Stock Exchange, and had been employed as such by H., a banker at Norwich. In the year 1870 they had bought for him £204,000 Spanish stock and £150,000 Italian stock. The Brokers paid the purchase-money, having borrowed money for that purpose from their bankers on the security of the stock. In their accounts they treated it as a loan to H. They were in the habit of sending H. fortnightly accounts after each settling-day. On the first settling-day in June, 1870, the stock had risen in price, and his accounts showed a balance in his favor of £8794. The Brokers paid £6700 to him, and, under verbal instructions from him, carried over or continued the stocks to the next settling-day. On the next settling-day, the 28th of June, these stocks had fallen, and there was on this account a balance of £292 against H. The stocks were again carried over or continued for the next settling-day, the 4th of July, on which day the stocks had fallen heavily, and the balance against H. was £15,988. He had on that day directed them to sell half the stock, which they did, and credited him with the price. The account was sent to him on the 14th. On the following day he shot himself, and died on the 19th of July. On the 16th H.'s bank at Norwich stopped payment. Messrs. S. being, as they stated, apprehensive of a further fall in the market, sold on the 16th, 18th, and 19th of July the remainder of the stock. The result of these transactions was that the balance against H. in the books of Messrs. S. was (after deducting their commission on the sales) £26,346.

A suit was instituted by creditors for the administration of the estate of H., and Messrs. S. carried in a claim against the

estate for this sum. In support of their claim, they produced evidence from members of the Stock Exchange that, with very few exceptions, all bargains and transactions on the Stock Exchange are made for certain periodical days called "settling-days;" that when it becomes notorious that a principal is, by reason of bankruptcy or death, unable to receive and pay for, or to deliver, the stock or shares which he has ordered to be purchased or sold, and that no one is authorized to deal with the account, or able and willing to take the responsibility thereof—then and in such case it is usual for the Broker, who is responsible to the members of the Stock Exchange for the transactions entered into for his principal, to proceed at the earliest practicable period to close the account of such principal by selling, on the best terms, amounts of all stocks or shares equivalent to those he may have contracted to deliver.

The court, in delivering the opinion, said: "The rules of the Stock Exchange are very reasonable, and would apply. Those rules are that when a Broker, making a contract in his own name, has made for his principal a contract by way of speculation whether certain stocks will, during the next fortnight, rise or fall, and the principal dies or becomes a bankrupt, or falls into such a state of insolvency that it is manifest the Brokers cannot depend on him to protect them against any loss that may occur, then the Brokers may at once terminate the transaction, so as to *make the profit or loss*, whichever it is, depend upon the state of things on that day, and not to run the risk of any further fall in the market. That appears to me a most reasonable rule."<sup>1</sup>

But it seems that the Brokers, before acting in this summary manner, should have some evidence of the insolven-

<sup>1</sup> See also, upon this point, *Lacey* Eq. 182; *Thacker vs. Hardy*, L. R. 4 vs. *Hill* (Crowley's Claim), L. R. 18 Q. B. Div. 685, 689.

cy or inability of their Client to perform his contract, and that they should be prepared, if the transaction be questioned, to furnish the same. It does not appear from *Lacey vs. Hill* what evidence of the inability of his Client to meet his engagements would be sufficient, but it would seem that each case must rest upon its own peculiar circumstances.

In the subsequent case, *Crowley's Claim*,<sup>1</sup> the Master of the Rolls, Sir G. Jessel held that the meaning of insolvency, under the Stock Exchange rules, was the simple meaning of the word as between business men; and that where a bank "put up its shutters" and did not pay, such act constituted good evidence of that condition. It should also be borne in mind that the Brokers who act thus summarily are liable for the consequences of their own conduct; for, if a Client's account should be closed before the settling-day, the Brokers must take the risk of the subsequent fluctuations of the market; and stress was laid upon this point, in the case above referred to, in this language: "If it had resulted in any loss to him, possibly it would have been a very good set-off. The executors would have said, 'We owed you money, but you closed the account earlier than you ought to have done, and the result is, you have exposed us to loss.'"<sup>2</sup> Sir G. Mellish, L. J., also said upon this point: "But the principal would have a counter-claim against him for damage, if any, which might have resulted from the fact of selling a fortnight earlier than he ought to have done. But if it turned out that the market kept continually falling during the fortnight, so that the sale was in fact a gain to the principal's estate, in that case there would be nothing to recover."

The effect of the rule thus indicated is quite unsatisfactory,

<sup>1</sup> *Lacey vs. Hill*, L. R. 18 Eq. 182.

<sup>2</sup> Per Sir W. M. James, L. J., L. R. 8 Ch. App. 923.

for, while it permits the Broker to terminate summarily a transaction, under the circumstances mentioned, it at the same time holds him for such act, if the market should turn in favor of his Client at the account-day. Thus the whole efficacy of the rule is destroyed. It may be said, however, that this question was not involved in the case, and that the above remarks are mere *dicta*.<sup>1</sup>

(c.) *Other Incidents of the Relation.*

Another important question has been raised,<sup>2</sup> as to the authority of a Stock-broker to continue the account to the next settling-day. The vice-chancellor in that case held that the Broker had *virtute officii* such authority; but, on appeal, the court did not put the decision upon that ground, preferring to rest it upon the fact that an order for the continuation had been given; and it seems that the Broker has no such authority.<sup>3</sup>

The case of *Duncan vs. Hill*<sup>4</sup> should be here mentioned as illustrating a dealing between Stock-brokers and their Clients. In that case the plaintiffs, Brokers on the London Stock Exchange, bought for their Client, defendant (who was not a member of the Exchange), certain shares for the account of the 15th of July; and on that day, by his instructions, carried them over to the account of the 29th of July, and paid differences amounting to £1688. On the

<sup>1</sup> See also *Pearson vs. Scott*, L. R. 9 Ch. Div. 198; *Melsheimer & Laurence's Law and Customs of the Stock Exchange*, 47. And compare also the rule in the United States (where it is held that a Broker cannot close a speculative transaction in stocks without notice to his Client), Ch. III. p. 188.

<sup>2</sup> *Sheppard vs. Murphy*, Ir. Rep. 2 Eq. 544.

<sup>3</sup> *Maxted vs. Paine*, L. R. 4 Ex. 81.

Nor has a Stock-broker authority to fill in a deed executed by a vendor in blank (*Taylor vs. Great Indian Peninsular Co.* 4 De G. & J. 559; *Hawkins vs. Maltby*, L. R. 3 Ch. App. 194). See, as to when a deed executed in blank, as to the name of a purchaser, is void, *Hibblethwaite vs. McMorine*, 6 M. & W. 200.

<sup>4</sup> *Same vs. Beeson*, L. R. 8 Ex. 242, rev'g L. R. 6 Exch. 255.

18th of July the plaintiffs, being unable to meet their engagements, by reason of various persons for whom they had effected contracts (and, among others, the defendant) failing to make their due payments, were declared defaulters, and, according to the rules of the Exchange, all their transactions were closed at the prices current on that day. The result was to make the Brokers liable to pay a further sum for differences, upon the stocks and shares so carried over by them for the defendant, and they sought to recover this difference, together with the £1688, from their Client. As to the latter claim, there was no contest; but, in respect to the former, the court gave judgment for the Client, holding that, as the loss incurred by the Brokers arose from their own default by reason of their insolvency, brought on by want of means to meet their other primary obligations, and that there was no evidence that such insolvency was occasioned by reason of their having entered into the contracts for their Client, the latter was not liable. If, however, the Brokers' losses accrued solely by reason of the failure of their Clients to make payments, it would seem that a different question would arise, as appears by the case of *Lacey vs. Hill*,<sup>1</sup> where the court held that the Stock-broker could recover a full indemnity for the loss occasioned by the act of his Client; though it appeared that the Stock-brokers, after having become defaulters, had settled with their Stock Exchange creditors at the rate of 6s. 8d. on the pound. Upon this point the court said:

“Then, it is said the Brokers made default, and that they have not paid for the stock they purchased for Sir H.; but if he has had the stock sold for him, and is credited with the proceeds, what difference can it make to him whether the Brokers paid for it, or whether the persons who sold it have

<sup>1</sup> *Crowley's Claim*, L. R. 18 Eq. 182. See also, as to right to indemnity, *ante*, p. 123 et seq.

chosen to give them credit for the amount? He has had the stock and has had it sold for him; that is, he has been credited with the proceeds. . . . It appears to me that that is the true view of the present transaction, and it is utterly immaterial whether the Broker, who has become personally liable for the amount, has paid at all."

A very interesting question arose in the case of *Mewburn vs. Eaton*,<sup>1</sup> between a Broker and his Clients. In that case the Broker had sold certain shares for his Client on the Stock Exchange, and the latter had executed the transfers and received the purchase price. Subsequently, however, the transfers were returned to the Broker by the ultimate purchaser for some trifling corrections in the spelling of names, who delivered the same to his Client for that purpose. The Client, however, refused to "initial" the corrections unless the Broker paid him the price mentioned in the transfers to the ultimate purchaser, which was higher than the price at which his shares were originally sold. In consequence the shares were bought in, and the Broker, under the rules of the Stock Exchange, was compelled to pay the differences to the Jobber. And the court held, that the Broker was entitled to recover the sum which he had so paid by reason of the conduct of the Client. The court did not pass upon the question as to whether a vendor was bound to sign a transfer to the ultimate purchaser in which the consideration was stated at a price greater than that which he had received for the shares; but the intimations were that he would not be so compelled. The court held that this objection had been waived by the Client in originally signing the transfers.<sup>2</sup> In respect to the manner, etc., in which the Broker should execute the business of his Client in the dif-

<sup>1</sup> 20 L. T. (n. s.) 449.

<sup>2</sup> In *Hawkins vs. Maltby*, L. R. 6 Eq. 505, L. R. 4 Ch. App. 200, the specific performance of a contract was refused on the ground that the

bill called for the enforcement of a contract for different consideration than that actually agreed upon. See also *Case vs. McClellan*, 25 L. T. (n. s.) 753.

ferent stages of a stock transaction, and of his general liability and duty, as well as his right to indemnity for losses incurred on behalf of his Client—these questions have all been considered in a previous chapter, and need not be set forth here.<sup>1</sup>

### *V. Relation between Client and Jobber.*

#### *(a.) General Liability of Jobber to Vendor.*

In England, nearly all of the cases in which there has arisen a discussion as to the nature of transactions on the Stock Exchange, have grown out of questions involving the liability of different persons for "calls."

A large, if not the principal, number of joint-stock companies are formed with their capital in part unpaid; and as "calls" for further payments upon the capital are liable to be made, it concerns the seller of the shares of such companies to ascertain that the ultimate buyer is a responsible person.<sup>2</sup> In the discussion of this question as to where the liability for "calls" rests, the nature and effect of a sale on the Stock Exchange have been fully examined on both the law and equity sides of the English courts, and the relations of the different parties to the transaction analyzed and defined.<sup>3</sup> Inasmuch as all dealings in securities upon the Stock Exchange are made between members of that body, who, under its rules, are regarded as principals to each other, and an outside person de-

<sup>1</sup> See Ch. III. p. 101. In respect to usage of Brokers, see chapter on "Usages."

<sup>2</sup> Per Kelly, C. B., *Grissell vs. Britow*, L. R. 4 C. P. 36, at 52, rev'g 3 id. 122; *Sheppard vs. Murphy*, 16 W. R. 948.

<sup>3</sup> *Maxted vs. Morris*, 21 L. T. (n. s.) 535; *Nickalls vs. Eaton*, 23 id. 689; *Dent vs. Nickalls*, 29 id. 536 (testi-

mony of Mr. De Zoete, Chairman of Stock Exchange, 536); *Peppercorne vs. Clench*, 26 id. 656; *Fenwick vs. Buck*, 19 W. R. 597; *Hodgkinson vs. Kelly*, L. R. 6 Eq. 496; *Nickalls vs. Merry*, L. R. 7 Eng. & I. App. Cas. 530, and cases there cited and discussed; *Capper's Case*, cited in *Cast case*, p. 545; see also L. R. 3 Ch. App. 458.

sirous of purchasing or selling, being therefore compelled to transact his business through a Broker, who does not disclose his principal's name, on the very threshold of an action by the latter against the jobber it was natural to encounter the objection that the action could not be maintained for want of privity between the parties.

This objection was urged in the first reported case, in an action brought by a vendor against a Jobber,<sup>1</sup> and in several subsequent cases; but, however divergent the views of the courts may have been respecting the liability of the Jobber in other respects, they are unanimous in the judgment that there is a clear and enforceable contract between the vendor and the Jobber.

It must be borne in mind, however, that as the rules of the Stock Exchange prohibit a member from dealing in the double character of Broker and Jobber, it is and was assumed in the case just referred to, that the Jobber deals with the Broker as one acting for a principal; but it is doubtful, even if this fact did not exist, whether the general rule which permits the real principal to enforce a contract would be altered.

The effect of such a transaction, according to the rules and usages of the Stock Exchange, and especially by Rules 49 and 61 of the printed rules, is to render Broker and Jobber personally responsible to each other for the fulfilment of the contract of sale, but at the same time leaving it entirely open to the undisclosed principals to intervene. Furthermore, the Broker and Jobber are at liberty to adopt any remedies against their principals that their own protection may demand.<sup>2</sup>

The purchasing Jobber may therefore be said to be the party primarily liable to the vendor, the Broker of the latter

<sup>1</sup> *Grissell vs. Bristowe* (Jan. 1868),  
L. R. 3 C. P. 112.

<sup>2</sup> *Dent vs. Nickalls*, 29 L. T. (n. s.)  
536; *Grissell vs. Bristowe*, L. R. 4 C.  
P. 36.



selling directly to him in the first instance ; but as the transaction is not to be closed immediately, the Jobber in turn selling the securities again, the elements of an ordinary sale are modified or displaced by the usages of the Stock Exchange.

These usages have been characterized by the courts as reasonable and binding upon the vendor, who, by authorizing a transaction to be made on the Stock Exchange, adopts and ratifies the methods of doing business which prevail there.

It is quite important to see what these usages are, and as they have been detailed in a recent case in the House of Lords,<sup>1</sup> by a prominent official of the Stock Exchange, we transcribe the account in full from that report : “ Mr. De Zoete has been appealed to as the exponent of the rules of the Stock Exchange, and I will now refer to his evidence. He states : “ In the case supposed, where the Jobber would stand as purchaser, he would, on the day preceding such account-day (which was usually called the “ name-day ”), be bound to pass to the Broker a ticket containing the name of a person, or of several persons, as the purchaser or purchasers of the said shares ; or he might, if he pleased, pass his own name as such purchaser, in which latter case only would he have been bound himself to take the shares. If the Jobber had failed to pass to the Broker such a name or names by the name-day, the selling Broker could have sold out the shares against him, and have compelled him to pay any loss thereon. Until the name-day it was not seen who might stand ultimately either as purchasers or sellers, or, in other words, who might be the persons to transfer or to take transfers of shares, and until then a Jobber might have had a great many transactions both of buying and selling with the same Brokers or Jobbers, or with various Brokers or Jobbers. On the name-day, in the case

<sup>1</sup> Nickalls vs. Merry, L. R. 7 H. L. Eng. and I. App. Cas. 530, 539.

supposed, if the Jobber, having purchased, had sold again, a ticket containing the name of the person to whom the shares were to be transferred would have been issued by and passed on from the ultimate purchasing Broker to his seller, and so on through the hands of the other intermediate sellers and buyers in succession, who, whether acting as Jobbers or as Brokers, had dealt in the shares until it reached the hands of the original selling Broker. Every member passing a ticket was required to write on the back of it the name of the member to whom it was passed ; such ticket would also have contained the amount of purchase-money agreed to be given for the shares by the ultimate purchasing Broker, and also a note that he would pay the same. So many transactions of this kind took place during the account that on the name-day the ticket, of necessity, only remained in the possession of an intermediate Jobber or Broker for the time required to take the particulars of it. It sometimes happened that the same ticket passed through the same member's hands several times in fulfilment of bargains made with other members, and, as a matter of fact, he had neither the opportunity, time, nor the means for making inquiries respecting the name so passed. The original selling Broker would not have been bound to deliver a transfer of the shares to the ultimate purchasing Broker until the expiration of ten days after the account-day, and during these ten days the said purchasing Broker could not have bought in the shares against the seller. During this time it was open to the original selling Broker to object to the name passed by his buyer, in which case such buyer would, of course, have passed on the objection to the person from whom he received the name as hereinbefore mentioned, and, practically, such buyer would have had no liability or interest in the question, as whatever grounds there might have been for objecting to the name would have had to be

met by the person from whom it emanated, and who had originally issued the ticket; and the committee of the said Stock Exchange would, if appealed to by the selling Broker, have decided as to the validity of any such objection, and would have required another name to be given in case they had considered it right to do so. But after the lapse of these ten days, the selling Broker was required to deliver the certificates and transfer of the shares to the said ultimate purchasing Broker, or, in default thereof, the latter could have bought in the shares against the seller. The usual course of business was for the selling Broker to deliver the transfer, together with the corresponding ticket, to the said ultimate purchasing Broker from whom he received the purchase-money. The said ultimate purchasing Broker did not know to whom his ticket had been ultimately passed until the delivery of the transfer. According to the long-recognized and well-established rules and usages of the said Exchange, if the original selling Broker did not deliver his transfer and certificates, and obtain payment of the purchase-money, within fifteen clear days from the name-day, his immediate buyer was released from all loss caused by the default of the ultimate purchasing Broker to pay for the shares, and the latter would alone remain responsible; in like manner, if the member who issued the ticket containing the name of the intended transferee of the shares did not buy in, or attempt to buy in, the same shares within fifteen days from the account day, his immediate seller was released from all loss caused by the failure of any member through whose default the shares were not delivered to, and the purchase-money paid by, the ultimate purchasing Broker. The Jobber had fulfilled all the obligations required of him by the rules and usages of the said Stock Exchange in respect of his contract.”<sup>1</sup>

<sup>1</sup> See also opinion of Byles, J., in *Grissell vs. Bristowe*, L. R. 3 C. P. 137.

As we have seen, the above usage came before the English courts for the first time in 1868 in the case of *Grissell vs. Bristowe*.<sup>1</sup> In that case the plaintiff, through his Brokers, sold certain shares on the Stock Exchange, and the defendants were the Jobbers with whom plaintiff's Brokers dealt. There was no direct dealing between the plaintiff and the defendant, nor was the former's name disclosed. The names passed by the defendants as transferees were accepted by plaintiff's Brokers, and the transfers executed, but not registered. The plaintiff, in consequence, was compelled to pay a call; and the transferees not being solvent, the plaintiff instituted the action against defendants, the Jobbers. The court held that the latter were bound to reimburse the plaintiff in the amount of such calls. On appeal,<sup>2</sup> however, this judgment was reversed; and it was decided that under the usages of the Stock Exchange, which the court adjudged reasonable, and with reference to which the contract was made, the defendants—the first buyers—were to be at liberty to transfer the contract, with all of its rights and obligations, to any responsible buyers who would take it upon them with all of its incidents; that as the plaintiff had transferred the shares to the defendant's nominees, and the latter had accepted and paid for them, though they had not executed or registered the transfers, the defendants were released from all further liability on their contract to the plaintiff.

Cockburn, C. J., said: "We are of opinion that the statement of the usage in this case must receive a reasonable intendment, and be understood as claiming for the Jobber a right to transfer the contract, and claim exemption from liability in respect of it, only on his giving a name of a buyer to whom the seller has no reasonable ground to object. And we are further of opinion, from the particulars of the usage

<sup>1</sup> L. R. 3 C. P. 112.

<sup>2</sup> L. R. 4 id. 36.

as stated in the case, that it is only when the nominees of the Jobber have paid for the shares—in other words, have accepted the transfer and placed themselves in the position of buyers, and taken upon themselves the obligations of the contract—that the Jobber is held to be released.” In interpreting the usage the same learned judge said: “The sum and substance of the usage, as we collect it, after a careful consideration of the statement in the case, may be thus stated: It appears that in transactions between members of the Stock Exchange there is an implied understanding that on the purchase of stock the Jobber shall be at liberty by a given day, commonly called the ‘name-day,’ to substitute, if he is able to do so, another party or parties as buyers, and so relieve himself from further liability on the contract, provided that such party or parties be persons to whom the seller cannot reasonably except, and that such party or parties accept the transfer of the shares and pay the price agreed on between the seller and the Jobber—in other words, become the buyer of the shares at the price originally agreed on.”

Contemporaneous with this litigation was that of *Coles vs. Bristowe*,<sup>1</sup> which arose out of a dealing in the shares of the same company.

In that case the plaintiff, through his Brokers, sold 200 shares to the defendants, who were Stock-jobbers, for settlement on the 15th of May. On the 10th the company stopped payment, and the petition for winding-up was presented on the 11th of May. The purchase-money was paid by the defendants on the 15th, and the certificates of the shares were then delivered by the plaintiff, and transfers were executed by him to seventeen persons as nominees of the defendants. The transfers could not be registered in consequence of the winding-up of the company. Upon a

<sup>1</sup> L. R. 6 Eq. 149. See also *Heritage vs. Paine*, 34 L. T. (n. s.) 947; 2 L. R. Ch. Div. 594.

bill for a specific performance, Vice-chancellor Malins held that the defendants were bound to fulfil the contract, to repay the amount of calls paid by the plaintiff, and to indemnify him against future calls. Upon appeal, however, this decree was reversed.<sup>1</sup> The Lord Chancellor said: "If this were an ordinary case of a sale and purchase of shares, in which the plaintiff was vendor and the defendants purchaser in the usual acceptation of these terms, the right of the plaintiff to relief would be clear."

But the court held that the case would have to be decided according to the usage and course of business of the Stock Exchange; and that, "according to this, the contract of the Jobber is that at the settling-day he will either take the shares himself—in which case he would, of course, be bound to accept and register a transfer, and to indemnify—or he will give the name of one or more transferees (names to which no reasonable objection can be made) who will accept and pay for the shares. The Jobber may perform either alternative; and if electing to perform the latter alternative, he sends in names which are accepted and to which transfers are executed, and those transfers are taken and paid for by the transferees or their Brokers: the Jobber is then, at that stage, relieved from further liability, and the liability to register and indemnify is shifted to the transferees."<sup>2</sup>

The subsequent case of *Maxted vs. Paine*<sup>3</sup> extended the principle still further, because it was there held that the Jobber discharged his contract by passing the name of any person answering the description of an "ultimate buyer," where it is used without fraud and is accepted; although it turn out that the person whose name is presented is a man of straw

<sup>1</sup> L. R. 4 Ch. App. 3.

*Mayhew's Case*, 5 De G. M. & G. 849,

<sup>2</sup> *Evans vs. Wood*, L. R. 5 Eq. 9; 850.

<sup>3</sup> L. R. 4 Ex. 203 (2d action).

and irresponsible, and has allowed his name to be used as a transferee for a consideration paid by the real purchaser. Bramwell, B., said: "I think the plaintiff would have had a right, according to these rules and practice, to object to Goss's name. I think Goss was a person he could not have been compelled to accept as a transferee. If I am wrong in this, the plaintiff has clearly no case. If I am right, then, had he objected, the defendant must have found a fresh name. He [the defendant] might then have objected to F. & Co., and they must have found a fresh name. But the plaintiff did not, nor did his Brokers, object, but he executed the transfer to Goss. . . . By the rules, the seller has ten days to make the transfer. During these ten days he can make inquiries as to the proposed transferee. The Jobber or other middleman has not a moment, for on the day he receives the name he must pass it on." But the Jobber is by no means, under the decisions, relieved from liability by merely passing a name, receiving the money, and executing transfers. The name passed must be that of a person legally compellable to take the shares.

This proposition is illustrated in the last-named case.<sup>1</sup> In that case the shares had been "continued" or carried over for another account-day, without the consent of the intended buyer, so that he was not bound to take the shares; and the court held that the Jobber was not discharged by passing such a name, but remained liable to the vendor. The court said: "When his name was passed, he had ceased to be a person who could be called upon to take the shares."

And, as was decided in a case before the English Chancery Appeals,<sup>2</sup> if the Jobber or Broker give the name of an infant as the transferee, he does not absolve himself from liability.

<sup>1</sup> *Maxted vs. Paine*, L. R. 4 Ex. 81 (1st action).

<sup>2</sup> *Maynard vs. Eaton*, L. R. 9 Ch. App. 414.

And the same rule applies to an ultimate purchaser who gives such a name; he cannot escape the consequences of his contract except by supplying a name capable of accepting the transfer and paying for the shares. This duty is not performed by giving the name of a person absolutely incapable of accepting the transfer.<sup>1</sup>

So where the name of an infant was given by the Jobber,<sup>2</sup> he was held liable for calls paid by the vendor, although another person might also be liable to pay the money, and might be the person who ultimately would have to pay. This principle was also subsequently affirmed.<sup>3</sup>

Nor is the Jobber relieved of his responsibility, if the name which he passes is that of a foreigner domiciled abroad.<sup>4</sup> What the effect would be of the Jobber giving the name of a foreigner otherwise unobjectionable, *i.e.*, having property in England which could be applied to satisfy any liability which might accrue in respect of the shares, has not yet been determined.

The question of the liability of the Jobber finally reached the House of Lords,<sup>5</sup> where it was elaborately argued and considered. It appeared in that case that M., not a member of the Stock Exchange, directed his Broker to sell certain shares. The latter sold them to a Jobber, who, according to the known practice on the Exchange, sold them again (and in a similar way they passed through several hands), and the Jobber (without fraud) received from his purchaser and passed to M.'s Broker the name of L. as the ultimate purchaser. M. executed a transfer to L., and received payment for the shares.

<sup>1</sup> *Id.* per Sir R. Malins, V. C., *rev'd* on other grounds.

<sup>2</sup> *Nickalls vs. Eaton*, 23 L. T. (n. s.) 689.

<sup>3</sup> *Dent vs. Nickalls*, 29 L. T. (n. s.) 537; *Peppercorne vs. Clench*, 26 *id.* 656.

<sup>4</sup> *Goldschmidt vs. Jones*, 22 L. T. (n. s.) 220; *Allan vs. Graves*, 39 L. J. Q. B. 157.

<sup>5</sup> *Nickalls vs. Merry*, L. R. 7 H. L. Eng. & Ir. App. Cas. 530.



L. turned out to be a minor legally incapable of accepting the shares. M.'s name, without his knowledge, remained on the registry of the company. Subsequent calls being made, which were not paid by L., M. was compelled to pay them.

The court decided that the Jobber was liable to make good to M. the amount he had paid on such calls; that the contract of a purchasing Jobber is to accept the shares, or to furnish the name of a person able and willing to accept them; and that the time (ten days) limited by the rules of the Stock Exchange for the approval or rejection of the name of the ultimate purchaser applies only to the *responsibility*, and not to the *personal capacity and willingness* of the person whose name is given. In reaching this result the case of *Rennie vs. Morris*<sup>1</sup> was overruled. The Lord Chancellor (Cairns) said: "It cannot be disputed that a valid contract was made between the respondent (the vendor) through his Broker and the appellant (the Jobber), and that this contract continued for some time to be binding upon both." Upon the question as to the character of the name which the Jobber could substitute, the Lord Chancellor added: "The words . . . clearly imply the name of a person who can and will purchase, and would have no application to the name of a non-existing person, a lunatic, an infant, a married woman, or a person who has given no authority to use his name. . . . In fact, the contract which, both from the nature of the case and the evidence of Mr. De Zoete, I understand the Jobber to make, may be thus expressed: 'I (the Jobber) agree with you (the seller) that on the account-day I will either myself take and pay for the shares, or else I will on that day furnish you with the name of another person who will agree with you to take a transfer of and pay for the shares; and if you desire to in-

<sup>1</sup> L. R. 13 Eq. 203.

quire into the responsibility of that other person, 'you shall have a limited number of days to do so.'"

The argument of *ab inconvenienti* was strongly pressed upon the court, in reply to which the Lord Chancellor said: "I will only add that it does not appear to me that this view of the effect of a contract of this kind ought to cause any inconvenience in the transactions on the Stock Exchange. The gentlemen forming that body have facilities, through the medium of their rules and their domestic jurisdiction, to take security that no member of the Exchange shall pass to another a name which is not real, *i. e.*, which does not describe a person competent and willing to contract." <sup>1</sup>

Stray vs. Russell <sup>2</sup> illustrates still further the extent and limit of the Jobber's responsibility. In that case the Client had ordered his Broker to buy certain shares for the next settling-day. The Broker purchased the required number from a Jobber, who, in due season, delivered certificates in proper form to the Broker, with the Client's name inserted therein as purchaser. The company having previously stopped payment, and the directors refusing to make any transfers upon the books of the company, the Client attempted to repudiate, whereupon the Broker, who had, under the rules of the Exchange, paid the purchase-price to the Jobber, brought suit and recovered judgment against his Client. The latter in turn sued the Jobber for the amount he had been compelled to pay his Broker, contending that it was the duty of the Jobber to have procured a transfer of the shares upon the books of the company, and that the sale was incomplete without it. But the court gave judgment for the Jobber, holding that his duty in the premises had been fully performed when

<sup>1</sup> The foregoing cases were followed in *Pender vs. Fox*, Week. Notes (1872), 151.

<sup>2</sup> 1 El. & E. 888.

he handed to the Client's Broker the transfers and certificates, and that it was not his duty to get the transfer registered. It seemed to be assumed in the case that there was a privity between a vendee and a selling Jobber.

The case of *Nickalls vs. Merry*, and the cases heretofore referred to, determine definitely the position of a Jobber, freeing him from responsibility only upon his passing the name of a person legally compellable to take the securities, and leaving the circumstances of any case to be affected by fraud as in any other contract.<sup>1</sup>

(b.) *Special Contract between Jobber and Client.—Guaranteeing Registration.*

The liability of the Jobber may, however, be extended by special agreement. We have seen that the Jobber sometimes guarantees registration, and the effect of such a guarantee was considered in the case of *Cruse vs. Paine*.<sup>2</sup> In that case the plaintiff sold through his Brokers certain shares to the defendants, who were Stock-jobbers. The sale note was as follows:

22 THREADNEEDLE STREET,  
LONDON, E. C., 2d Nov., 1865. }

Sold by order and for account and risk of A. Cruse, Esq. (subject to the rules of the London Stock Exchange),

To H. Paine & Co.,

100 Contract Corporation Shares, at 7 dis..... £300 00  
(With registration guaranteed.)

V. & W. Stamp fees.....

£300 00

Brokerage..... 1 05

£298 15

VERTUE & WHITING.

Payment 15th Nov.

<sup>1</sup> See also *Birmingham vs. Sheridan*, 33 Beav. 660.

<sup>2</sup> L. R. 6 Eq. 641.

Shortly before the 15th of November the defendants sent to the plaintiff's Brokers the name of H. as transferee, with the purchase-money, and the transfers were executed by the plaintiff to H. and delivered to his Brokers. The transfers were not, however, registered; and the defendants, in December, 1866, obtained a decree for specific performance by H. of the contract with them, and for indemnity. Meanwhile the company had been wound up, and the plaintiff's name, being still on the register, was settled on the list of contributories. He filed a bill against the defendants for specific performance and indemnity.

The court held that the Jobbers were simply principals, and were personally liable upon the contract into which they had entered; that the mere fact of the plaintiff having executed at the instance of the defendants a transfer did not alter the liabilities of the parties under the special contract; that it did not in any sense release the defendants from their obligation to get a complete registration, so that the vendor should by their acts be actually released from liability in respect of the shares. The court further decided that the plaintiff having died, and his executor having been placed upon the list of contributories, the executor was entitled to all the rights to which his testator, if living, would have been entitled; and that the right to indemnity was not limited to the amount of dividends which the estate would be sufficient to pay.

Upon appeal<sup>1</sup> this result was sustained. The appellate court was of opinion that the introduction of the words "registration guaranteed" took the case out of an ordinary sale to a Jobber, and the terms were not merely that the Jobber should find a purchaser who would pay for the shares and accept the transfer, but that the Jobber should find a purchaser who would do that and would also register the transfer; and until

<sup>1</sup> L. R. 4 Ch. App. 441.

that was done the Jobber was not discharged from his engagement.

(c.) *Liability of Client to Jobber.*

Inasmuch as the law regards a Jobber as the principal, he has rights which can be enforced against the principal of the Broker with whom he contracts, when the former is discovered, to the same extent as the principal can enforce his claims against the Jobber. This position is established by the case of *Paine vs. Hutchinson*.<sup>1</sup> There the plaintiff's Jobbers on the Stock Exchange contracted to sell to the Brokers of the defendant shares which they had purchased from, and which remained registered in the name of, one C. On the settling-day the Brokers of the defendant gave his name as principal for insertion in the deeds of transfer. Transfers executed by C. to the defendant were delivered to defendant's Brokers, who paid for the shares out of the money given to them by the defendant. The defendant refused to execute the deeds and to procure their registration, on the grounds that he had told his Brokers that he intended to resell without taking a transfer, and that they had given his name without authority. Some months after the sale the company was ordered to be wound up; and on a bill for specific performance and indemnity (filed before the winding-up), to which C. was not a party, the court held that the contract was very plain in its terms, and was binding upon the defendant; that, as he had not supplied the name of a transferee, the Brokers were entitled to give that of the defendant; that the plaintiff was entitled to a decree for specific performance; that C. should execute the deeds of transfer to defendant, and that the latter should procure the registration in his name upon the company's books. Upon appeal this decree was affirmed.<sup>2</sup>

The case of *Mortimer vs. McCallan*<sup>3</sup> is instructive in this

<sup>1</sup> L. R. 3 Eq. 257.

<sup>2</sup> L. R. 3 Ch. App. 388.

<sup>3</sup> 6 M. & W. 58.

connection. This was an action in assumpsit in £5000, for certain £3 per cent. stock alleged to be sold and caused to be transferred by the plaintiff to the defendant, and by the defendant duly accepted. Pleas—1st, non-assumpsit; 2d, that the defendant did not accept the stock from the plaintiff. At the trial it appeared that one T., a Stock-broker, had applied to the plaintiff, a Stock-jobber, for the purchase of certain stock for the defendant. The plaintiff not having stock of his own, applied to W., who agreed to transfer, and did accordingly transfer, stock standing in his name to the defendant. It further appeared that T. gave his own check for the purchase-money, requesting that the same should not be presented until the following day; although, after the transfer, the plaintiff had requested T. to give him the check of his principal. The check of T. was dishonored. It was also shown that T. had for a long time owed the defendant £5000 worth of stock which the defendant had allowed to remain in his hands, on receiving an undertaking that he would replace it within a certain time.

Evidence was given that it was the usage on the Stock Exchange to give credit to the Broker even though the principal were disclosed; though credit is sometimes given to the principal, and his check taken, where the Broker's credit is not thought sufficient. The trial judge instructed the jury that although, by the regulation of the Stock Exchange, the Broker was the party considered liable, it did not follow that the principal might not be liable also, and he left it to them to say whether the plaintiff had ever given credit to or taken the responsibility of T., or ever consented to release the defendant as principal.

Upon appeal from a verdict in favor of the plaintiff, the court recognized the question as one of great importance, involving the practice of the Stock Exchange generally. The

court also conceded that on the Stock Exchange there was an understanding between the parties that *inter se* they hold the Broker liable; and while not denying that that understanding would have a very great influence on the question in individual cases, in the case in question the evidence left it in doubt whether the Jobber meant to hold the Broker alone responsible, or to have also the security of the principal; that the rules of the Stock Exchange would not make any difference as to the right of a party who sells stock to choose to what person he would give credit; and that the question as to whom the Jobber or plaintiff intended to give credit was for the jury to determine. And the verdict was accordingly sustained.

#### *VI. Relation of Client to Undisclosed and Intermediate Purchasers.*

As will be perceived from a review of the course of business on the Stock Exchange, in an ordinary transaction, the only persons who are brought into contact with each other are the Broker of the selling Client, or vendor, the purchasing Jobber, or Broker, and in the end the ultimate purchaser. As between the selling Client, or vendor, and the purchasing Jobber, there is, as we have shown, a clear and direct contract. Or if the vendee is a Broker purchasing on account of a principal, the liabilities of the latter are the same as those of a purchasing Jobber.

There is no difference in the rules and usages of the Stock Exchange as to the liability of a Broker member and that of a Jobber member. On the contrary, it seems that their contracts and their duties towards those with whom they contract are identical, though the motives inducing them to enter into the transaction are different.<sup>1</sup>

<sup>1</sup> Per Blackburn, J., *Maxted vs. Paine*, L. R. 6 Ex. 132, 170.

Before considering the relation of selling Client, or vendor, to the ultimate purchaser, let us examine the position of the intermediate or undisclosed purchasers, if there be any. We have already seen that by the rules of the Stock Exchange the ticket containing the name of the ultimate purchaser, or his nominee, as the case may be, is endorsed by each Jobber or Broker through whose hands it passes; but, as Cockburn, C. J.,<sup>1</sup> puts it: "In the end the transaction becomes one which is to be carried out between the vendee (the issuer of the ticket) and the original seller, as though such vendee had purchased immediately of such seller." The question is then presented, whether there is any liability between the holder of such a ticket and the purchasers intervening after the commencement of the transaction, but before the final termination of the same? Is there any privity between such parties? Does there arise from the nature of the transaction an implied contract between these persons? Is there any liability on the part of undisclosed purchasers who introduce the names of other persons to represent them in the transaction?

These questions were to some extent involved in the case of *Torrington vs. Lowe*.<sup>2</sup> There the plaintiff sold through his Brokers, on the Stock Exchange, certain shares in an incorporated association to one P., a Jobber. The defendant, in the same month, purchased through his Brokers on the Stock Exchange an equal number of shares in the same company. Both the above sale and purchase were made for the same settling-day. The defendant's Brokers, on the name-day, instructed P., the Jobber, to pass the name of one C. as the transferee of the shares so purchased, which was accordingly done, and a transfer was duly executed by both plaintiff and C. in the proper form prescribed by the articles of association, and

<sup>1</sup> *Grissell vs. Bristowe*, L. R. 4 C. P. 43.

<sup>2</sup> L. R. 4 C. P. 26.



the purchase-price duly paid to the plaintiff through his Brokers. A petition for winding up the company having been afterwards presented, the liquidators refused to register the transfer, and placed the plaintiff on the list of contributories, and he was consequently obliged to pay certain calls. To recover the amount he had been compelled to pay, he brought an action at law against the defendant.

The court decided against the plaintiff on the ground that there was no contract between him and defendant; that the contract between the plaintiff and the Jobber had been fulfilled by the latter's presenting a name which the plaintiff had accepted; and that the fact that C., the transferee, was an agent of the defendant made no difference in the result, the rule of law being that a principal cannot be sued on a deed to which he is not a party. The court seemed to think that even in equity there would be no remedy. The original contract of sale was between plaintiff and P., the Jobber; and, in pursuance of the usage of the Stock Exchange, P. at the proper time gave the name of C. as the purchaser of the shares, and that plaintiff had accepted him and executed a transfer to him.

Nor would it seem, under the case of *Grissell vs. Bristowe*,<sup>1</sup> that the plaintiff could hold the Jobber liable in such a case, for the latter was released upon giving the name of a proper party as a transferee.

Lord Blackburn, in his elaborate opinion in the case of *Maxted vs. Paine*,<sup>2</sup> dissents from the conclusion of the court in *Torrington vs. Lowe*, and maintains that the plaintiff had a remedy at law as well as in equity against the defendant.

This view of Lord Blackburn seems to have been adopted in a subsequent case,<sup>3</sup> where the facts were substantially

<sup>1</sup> L. R. 4 C. P. 36.

<sup>2</sup> L. R. 6 Ex. 132, 167.

<sup>3</sup> *Castellan vs. Hobson*, L. R. 10 Eq. 47.

similar to those of *Torrington vs. Lowe*.<sup>1</sup> The court overruled the defence of want of privity; and held that where A, through his Broker, sold shares to a Jobber, from whom B had agreed to purchase the same number of shares—giving the name of C, one of his workmen, as the person to whom the shares were to be transferred—and in consequence of the winding-up of the company the transfer could not be registered, and the shares still remained in the name of A, an action would lie by the latter against B, as the real purchaser and equitable owner, to indemnify A against calls in respect of the shares. The court said: “. . . It is not a question of vendor and purchaser; it is not a question of specific performance at all: it is a question of trustee and *cestui que trust*.” The court held that C, the workman, was not the owner of the shares, but a mere agent, and that it could pass over to the real owner, B; and that C, the intermediate trustee of a mere equity, could be disregarded altogether.

*Torrington vs. Lowe*<sup>2</sup> was not referred to in the opinion. The same principle was applied in a case<sup>3</sup> where the name of an infant was given as transferee. About two years afterwards, an order was made to wind up the company, and it being found that the transferee was an infant, the plaintiff's name was restored to the register. The court held that he was entitled to indemnity from the real owner of the shares.<sup>4</sup>

The better view, therefore, would seem to be that an undisclosed or intermediate purchaser of securities on the Stock Exchange is liable, upon being discovered, to the same extent and upon the same principle as an ultimate purchaser.<sup>5</sup>

<sup>1</sup> L. R. 4 C. P. 26.

<sup>2</sup> Id.

<sup>3</sup> Per Blackburn, J., *Macted vs.*

<sup>4</sup> *Brown vs. Black*, L. R. 8 Ch. Paine (2d action), L. R. 6 Ex. 132, App. 939. 167; see also *Humble vs. Langston*, 7

<sup>5</sup> See also, in this connection, s. c. *M. & W.* 517; *Walker vs. Bartlett*, 17 L. R. 15 Eq. 363. C. B. 446.

This view is not affected by the case of *Sayles vs. Blane*.<sup>1</sup> There S. sold certain railway shares, of which B., after intermediate sales, and without any privity with S., became purchaser. S. transferred them to B. by deed. B. not having registered the transfer, S. was obliged to pay a subsequent call. The court held that for such payment S. could not maintain an action against B. as for money paid to his use. The sale did not appear to have been made through the Stock Exchange, and its rules and usages were not noticed, the case being disposed of on the form of the action—the court intimating that the plaintiff had a cause of action against the defendant for a failure in the performance of a duty on the part of the defendant in not getting the transfer deed registered.

Another case, in the Queen's Bench,<sup>2</sup> should also be mentioned in this connection. In that case it was held that a Stock-jobber who had agreed to "take in" shares purchased by a fellow Stock-jobber from a Broker acting for a principal, and who had failed to deliver the name and address of a person into whose name the shares were to be transferred, was directly liable to the vendor for calls which the latter was compelled to pay by reason of the shares remaining in his name. But it will be noticed that the Brokers of the vendor were actually brought in contact with the intermediate purchaser—the second Jobber—and negotiated with him concerning the shares.

### *VII. Relation between Selling Client, or Vendor, and Ultimate Purchaser, or Transferrer, and Transferee.*

The last step in the transaction is the actual delivery of the stock or securities by the original seller to the ultimate

<sup>1</sup> 14 Q. B. 205.

<sup>2</sup> *Allan vs. Graves*, 39 L. J. (n. s.) 157.

purchaser. This portion of the business most powerfully illustrates the influence and scope of the usages of the Stock Exchange upon the contract.

Ordinarily, in the sale of property, the buyer and the seller meet and consummate the transaction in person, or they are brought into contact with each other by means of Brokers authorized by, and acting directly for, their respective principals.

The usages of the Stock Exchange produce the legal paradox of a vendor selling to a vendee with whom he does not have any dealings, either personally or through his immediate Brokers, and who frequently is not in existence in his character of purchaser when the vendor makes the sale.

Again, ordinarily, to make a binding contract in law, there must be a meeting of minds, mutuality, with reference to the same subject-matter, upon the same terms and price; yet a Stock Exchange transaction frequently exhibits a sale made *in presenti* which takes effect *in futuro*, the place of the first vendee being frequently filled by another person or persons who may purchase at a price different from that at which the first vendor originally sold.

All of these seeming incongruities result from the usages of the Stock Exchange and the peculiar course of dealing carried on there. But it will be observed that the rights of a vendor are not in any way infringed or diminished by these ramifications of business.

We have seen that a sale may be made either for money or for the account. If for money, the transaction is concluded at once; if for the account, a vendor who launches a sale upon the Exchange knows, or is presumed to know, that his vendee is not necessarily the person to whom his Broker originally makes the sale, but may be a different person purchasing for some intermediate Jobber at a subsequent date,

and to whom delivery is to be ultimately made. The legal elucidations of the relation between the original vendor and the ultimate purchaser have grown out of contests as to where the responsibility for "calls" rested. In this connection it is proposed to set forth the principal cases that have arisen between these persons, remarking that in the case of the sale of securities, where the capital is fully paid in, no such contests would arise—the purchaser in such event merely receiving the security, and the seller the money, there being nothing in such a transaction necessarily different from what might occur in the sale of any other kind of personal property.

The leading authority in England upon this subject is *Hodgkinson vs. Kelly*.<sup>1</sup> There A bought of a Jobber on the Stock Exchange shares in a certain company; and afterwards, the company in the meantime having stopped payment, B sold to another Jobber shares in the same company at a lower price for the same settling-day. On the name-day A's name was given to B as the purchaser of B's shares. B executed a transfer of the shares to A, and delivered the transfer and certificate to A's Broker, who paid the price for which A purchased the shares; A afterwards repaid his own Broker and took away the transfer and certificates, but did not execute the transfer, and it was never registered, in consequence of which B was compelled to pay certain "calls." B brought action against A to indemnify him against all consequences flowing from the ownership of the shares subsequent to the execution of the transfer.

The court, per Romilly, M. R., sustained the action, and a decree was entered for the plaintiff. The court held that contracts for the sale of shares on the Stock Exchange were not like, and could not be made to depend on exactly

<sup>1</sup> L. R. 6 Eq. 496.

the same principles as were applicable to, contracts for the sale and purchase of other matters—sales of houses and the like; but when a man sold or bought shares through his Broker on the Stock Exchange, he entered into an implied contract to sell or buy according to the customs or usages prevalent in that body; that there was nothing illegal or immoral in these usages; that a person by ordering a transaction to be consummated at that place entered into a contract, not with a specified person, but with a person whose name is to be disclosed afterwards, when the transaction is complete. Lord Romilly said: “It is not, as has been supposed, that the seller of shares constitutes an agent to find out and enter into a contract with some particular buyer, or, on the other hand, that the buyer does the same as to the seller, but both parties agree to be bound by the usage of the Stock Exchange, which binds both parties from the beginning, but which leaves each of the parties to the eventual contract ignorant of the other until the day arrives and the instrument of transfer is executed. It was put in argument as resembling a contract by which A sells to B, B to C, C to D, and D to E; and, at the request of B, C, and D, A executes the transfer to E; but, in truth, this does not appear to me to put the case sufficiently high. It is, in my opinion, an engagement entered into by A on one side, and E on the other, that through the instrumentality of certain other persons, whoever they may be, certain shares shall be sold and bought, and they undertake to complete the contract with the person, whoever he may be, who buys on one hand, and sells on the other.” The court held that these usages were founded on common-sense and common honesty, and that it was of no importance to A to know to whom his shares are to be transferred, nor is it to B to know from whence the shares come. The court based this result on the

cases cited in the notes.<sup>1</sup> In *Sheppard vs. Murphy*,<sup>2</sup> which was an action in equity, brought by a vendor against an ultimate purchaser, the court held, in answer to the argument that there was no privity between the plaintiff and the defendant, that the nature of a transaction on the Stock Exchange by which a vendor of securities was brought into contact with an ultimate purchaser was not a contract between the possessor of a thing at the time and another party for the delivery of a specific thing, but a contract that the person who enters into it shall, upon the day on which it is to be performed, procure persons to do a thing that he undertakes shall be done, and that upon that occasion the person who is to receive this thing, and not until that day, shall pay these persons, and not the person who has made the bargain at all. In other words, if A had bought one hundred shares from one hundred different persons, he could have walked to the office of the vendee's Broker with his hundred men at his back, each with a transfer of one share in his pocket, and he could have said to the vendee's Brokers, "Here are the shares, now pay to each man his aliquot portion of this sum; that is, buy every share just at that price I am willing to sell it to you for, from the persons who have come here to deliver them." But upon the Stock Exchange a symbolical mode of proceeding has been adopted to prevent the necessity of the above course—viz., giving a "name;" and when the name is given transfers of the shares are made to the vendee, and, without occupying the time of all these parties, the whole thing is done by this simple process, which is not open to any charge of illegality or objection.

<sup>1</sup> *Grissell vs. Bristowe*, L. R. 3 Ch. App. 112; *Hawkins vs. Maltby*, L. R. 3 id. 188; *Evans vs. Wood*, L. R. 5 Eq. 9, and the Irish case *Sheppard vs. Murphy*, Ir. Reps. 1 Eq. 490; s. c. on appeal, 16 W. R. 948.  
<sup>2</sup> 16 W. R. 948, overruling Ir. Reps. 1 Eq. 490.

In one case,<sup>1</sup> A sold to a Stock-jobber and B purchased from N five shares in a joint-stock company. According to the practice of the Stock Exchange, N gave to A, the original vendor, the name of B as the purchaser, and the transfer of the shares from A to B was executed by A and B, and the purchase-money paid by B to A; but B was prevented, by accidental absence from home, from sending the transfer for registration until after the company had stopped payment. B's name was not registered, and, A's name appearing on the books, the latter was compelled to pay certain calls. B was held liable for these calls and to indemnify A against future liability in respect to the shares.

This question was again directly in issue in a case<sup>2</sup> in which a bill was filed by a vendor, to compel an ultimate purchaser to take shares which he had bought through the vendor's Broker, and upon which a call had been made.

The action was resisted on the ground that the Jobber had had no dealings with the vendor, and that there was no privity between them. The court overruled this objection, saying: "The defendant first insists that there is no privity between himself and the plaintiffs, the original vendors. Undoubtedly, upon the original transaction, there was not; but . . . though the plaintiffs did not in the first instance agree to sell to the defendant, nor the defendant to purchase from the plaintiffs, yet when afterwards they were brought together, and the defendant agreed to take the transfer and carried away the certificates, he adopted the whole contract and became the purchaser."

This view was sustained upon appeal,<sup>3</sup> Lord Chelmsford, L. C., saying that "he [defendant] knew that shares frequently passed through several hands before they came into posses-

<sup>1</sup> Evans vs. Wood, L. R. 5 Eq. 9.

<sup>3</sup> L. R. 3 Ch. App. 188.

<sup>2</sup> Hawkins vs. Maltby, L. R. 4 id. 572.



sion of the actual purchaser, to whom the transfer would be made; and he knew that the transfer would not be made by the person from whom he purchased, but by the holder of the shares."

In *Davis vs. Haycock*,<sup>1</sup> the defendant had, on the 14th day of April, 1866, bought, through his Broker, of one G., a Jobber, fifty shares in O. G. & Co. The shares were bought for the 27th, but were afterwards carried over to the next account-day, the 15th of May, G. paying backwardation. On the 16th of May, the plaintiff, through his Broker, sold to G. for immediate delivery thirty shares in the same company. On the 10th of May the company stopped payment, and the next day a winding-up petition was presented. On the 14th of May (the name-day) the defendant's Brokers, as purchasing Brokers, issued a ticket for the shares in his name to the selling Jobber. The Jobber, in conformity with the usages of the Stock Exchange, divided the defendant's ticket, and handed to the plaintiff's Broker, in part performance of his contract, a ticket containing defendant's name as purchaser of ten shares. The transfer of the shares was duly executed by the plaintiff, and, together with the certificates, were finally delivered to the defendant, who retained the same.

After the company stopped payment, the directors refused to register any transfer. Two calls were made after the stoppage, which plaintiff, whose name remained on the register, was compelled to pay. An action at law was brought to recover the amount of these calls. The defendant contended that there was no privity of contract between the parties, and that the contracts made with the Jobber by each of the parties were entirely separate and independent, had never been consolidated, and sought to distinguish the cases of *Hodgkinson vs. Kelly* and *Hawkins vs. Maltby* from that action.

<sup>1</sup> L. R. 4 Ex. 373.

There was a division of the court, two of the judges, Kelly, C. B., and Pigott, B., holding that plaintiff was entitled to judgment, and Cleasby and Channel, BB., dissenting from that view on the ground that the plaintiff had no remedy at law, but not denying that the plaintiff was entitled to relief in equity.

As the usages of the Stock Exchange are expressly incorporated into all transactions which take place there, the better view would seem to be that advanced in the opinion of Kelly, C. B.

Without giving any more cases in detail, the result of the decisions seems to establish the following propositions:

*First.* A contract between the vendor and the ultimate purchaser is complete when a ticket containing the name of the purchaser has been delivered by his authority to the vendor, and he has accepted the name, indicated that acceptance by receiving the purchase-money, or in some other definite manner.

*Second.* Although, in the case of *Stephens vs. Medina*,<sup>1</sup> it was decided that where registered shares are transferable only by deed it is the duty of the purchaser to tender to the vendor a transfer-deed, duly executed, as a condition precedent to enforcing the contract, yet it is the usage of the Stock Exchange for the seller to prepare a deed at the expense of the purchaser. A tender of this deed, duly executed, must be made before the purchase-money can be demanded.

*Third.* The transferror is not bound to procure the consent of the directors (if required) to the registration of the transfers, because the contract of sale is not made conditional on the insertion of the purchaser's name on the list of shareholders.<sup>2</sup>

<sup>1</sup> 4 Q. B. 422; followed by *Bowlby vs. Bell*, 3 C. B. 284.

<sup>2</sup> *Lindley on Part.* 714 (u.); *Stray vs. Russell*, 1 El. & E. 888; *Paine vs.*

*Fourth.* The transferror is liable to account to the transferee for all dividends or any bonus or new shares which he may have received, or which may have been issued to him in right of the shares which he has contracted to sell while his name remained on the register.<sup>1</sup> The principle upon which the courts act is, that from the time a contract is entered into the transferror becomes a trustee of the security for the immediate buyer or his vendee or nominee, and therefore, until registration is completed, occupies the technical position of legal owner, without any beneficial interest in the subject-matter of the trust.

*Fifth.* As a result of the principle just alluded to, the transferee is bound to pay all calls and to assume all other liabilities accruing after the contract is made,<sup>2</sup> although the transfer-deeds are never executed by the transferee, it being, as we have seen, the duty of the transferee to have the transfer-deeds executed and registered.<sup>3</sup>

*Sixth.* We have already seen that the real buyer of the shares is, when discovered, liable to indemnify the seller although his name has not been passed as the ultimate purchaser, but, instead thereof, the name of some real or fictitious person being inserted.

Hutchinson, 3 Ch. App. 388; Evans vs. Wood, L. R. 5 Eq. 9; Hodgkinson vs. Kelly, L. R. 6 id. 496; Holmes vs. Symons, L. R. 13 id. 66, although this was not formerly thought to be the rule (Birmingham vs. Sheridan, 32 Beav. 660): this case cannot, however, be relied on in determining contracts on the Stock Exchange, as has been admitted by the judge who decided it.

<sup>1</sup> Black vs. Homersham, 4 L. R. Ex. Div. 24; Stewart vs. Lupton, 22 W. R. 855.

<sup>2</sup> Evans vs. Wood, L. R. 5 Eq. 9; Hawkins vs. Maltby, 3 Ch. App. 188, on app. from 4 L. R. Eq. 572.

<sup>3</sup> Id. and cases heretofore cited; Morris vs. Cannan, 4 De G. F. & J. 581; Cheale vs. Kenward, 3 De G. & J. 27; Wynne vs. Price, 3 De G. & S. 310.

## CHAPTER VI.

## THE PARIS BOURSE.

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- I. History of the Bourse.*
  - II. Agents de Change.*
  - III. Nature of Transactions.*
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*I. History of the Bourse.*

THE Paris Bourse is an association whose history can be traced back for several centuries; and one can find in the early authors of France many complaints of the noisy and turbulent gatherings of the money-changers and Brokers in different streets of Paris, until finally, in the beginning of the fourteenth century, public convenience demanded that these public assemblages, which interfered with the orderly traffic of the capital, should be confined to a certain locality. Accordingly, in February, 1304, it was ordered that the "Change de Paris," the nucleus of to-day's Bourse, be established at the Grand Pont, on the side of La Grève, between the Great Arch and the Church of St. Leufroy.<sup>1</sup> From the Grand Pont it was first transferred to the large court of the Palais de Justice, before the Galerie Dauphiné; but, as transactions grew in volume, every space assigned to the Broker had to make place for a larger one.<sup>2</sup>

<sup>1</sup> Bédarride, Droit Commercial, 6, 133.

<sup>2</sup> Or, "chassée d'un local public, la spéculation déploya sa tente dans la

The history of the Bourse shows many successive struggles against hostile decrees of changing governments, all impelled by a general public sentiment which appeared to regard its doings as noxious and immoral. The speculative excitement created by John Law in 1720 attracted such hosts of stock speculators to the Bourse that the Brokers had to go from the narrow Rue Quincampoix, where they then were, to the Place Vendôme, and soon after to the gardens of the Hôtel de Soissons.<sup>1</sup> It appears that owing to these frequent changes of locality the Brokers, instead of having fixed offices, occupied temporary booths or stands in these gardens, for which 500 francs monthly rent was asked,<sup>2</sup> and the demands even at that figure could not be supplied.

In consequence of the condition of the country caused by the schemes of Law in 1720, an *arrêt du conseil* ordered the suppression of the Bourse, then situated in the Hôtel de Soissons.<sup>3</sup> But this suppression, caused, as we have seen, by the collapse of the Law bubble in stocks, lasted only four years; for in September, 1724, by an *arrêt du conseil*, the Bourse was given a legal character, and it was decreed that an Exchange should be established with its official quarters at the Hôtel de Nevers,<sup>4</sup> where transactions in stocks and merchandise might be made through sixty *agents de change*, to be appointed by the King, according to the provisions of an edict previously made in the month of January, 1723.<sup>5</sup> And it was especially prohibited to hold any gathering for stock dealings at any place other than the regular Bourse under penalty of a heavy fine. It was also forbidden to announce by voice or sign the

rue ; sur les bords fangeux des ruisseaux ou chercha un refuge dans les repaires obscurs des bouges et des cabarets environnants."—M. Jean-notte Bozérain, *La Bourse*, t. 1, p. 16, N<sup>o</sup>. 18.

<sup>1</sup> Buchère, *Opérations de la Bourse*, 7.

<sup>2</sup> Bédarride, *Droit Comm.* 6.

<sup>3</sup> *Id.* 9.

<sup>4</sup> Buchère, *Opérations de la Bourse*, 7.

<sup>5</sup> Bédarride, *Droit Comm.* 9, 10.

price of any security with a view of putting its quotation up or down; and every Broker violating this provision was to be liable to a fine of 6000 livres, while private persons were to be punished by being forever excluded from the Bourse.<sup>1</sup> The alleged object of this strange regulation was "to maintain the order and tranquillity of the Bourse, so that every one might transact his affairs uninterruptedly."<sup>2</sup> But these and other hostile provisions proved inoperative, and were subsequently repealed.

The Bourse continued its location at the Hôtel de Nevers until the year 1793, when it was closed by a decree of the 27th of June of that year.<sup>3</sup> Its suppression, however, caused by the turmoils of the Revolution, was of but short duration, for by a decree of the very same year it was re-established. By the terms of the latter all persons in Paris, as well as in other cities where there were Bourses, were prohibited from making operations of a designated character in any places except those where the authorized Bourses were held. After these decrees the Paris Bourse was temporarily installed in the Church of the Little Fathers, whence it was removed first to that part of the Palais Royal now occupied by the Galerie d'Orléans, and subsequently to the Convent of the Daughters of St. Thomas. Here it remained until it obtained possession of its present building, of which Napoleon I. laid the corner-stone, but which was not finished till the end of 1826.<sup>4</sup> The State furnished the ground for the building, while the city of Paris paid for the cost of its erection, which was over 8,000,000 francs.<sup>5</sup>

<sup>1</sup> Bédarride, Droit Comm. 32.

<sup>4</sup> Id. 8.

<sup>2</sup> Id.

<sup>5</sup> P. Larousse, Dictionnaire Uni-

<sup>3</sup> Buchère, Opérations de la Bourse, versel, 1145.

## *II. Agents de Change.*

The functions of the Stock-broker in France are principally regulated by the 76th article of the Commercial Code of that country. We give the article in full in the notes. By this article the legally constituted *agents de change* have the sole right to negotiate public and other securities susceptible of quotation, and also bills of exchange and other commercial instruments. Concurrently with merchandise Brokers, they were also empowered to negotiate for the sale or purchase of metallic values, but by usage the dealings were confined to gold and silver in coin or bars.<sup>1</sup> The legal status of the *agent de change* is quite unique. He is a government officer in one sense of the word, and, though a public functionary, he is yet mainly amenable to the discipline of the Governors (*Chambre Syndicale*) of the Bourse, whose powers appear to be almost, if not quite, as autocratic as those of the Governors of the London or the New York Stock Exchange.<sup>2</sup> And the government has a supervising authority to see that the proceedings of the Bourse are carried on in conformity with the requirements of the law and good order; but in all disputes and questions affecting the rights and interests of the Brokers, the decisions of the *Chambre Syndicale*, or Governing Committee, chosen by the Bourse, are generally final.<sup>3</sup> The number of *agents de change* in each city is regulated by a decree of the State upon the proposition of the Minister of Finance. At Paris this number

<sup>1</sup> Bédarride, Droit Comm. 202. "Art. 76. Les agents de change, constitués de la manière prescrite par la loi, ont seuls le droit de faire les négociations des effets publics et autres susceptibles d'être cotés; de faire pour le compte d'autrui les négociations des lettres de change ou billets, et de tous papiers commercables, et d'en constater le cours. Les agents de change pourront faire, concurremment avec les courtiers de marchandises, les négociations, et le courtage des ventes ou achats de matières métalliques. Ils ont seuls le droit d'en constater le cours."

<sup>2</sup> Buchère, Opérations de la Bourse. See Rules of Paris Bourse in Appendix.

<sup>3</sup> Id.

was fixed at sixty by a royal ordinance of the 29th of May, 1816, which has never since been modified.<sup>1</sup> The *agents de change* are nominated by the chief executive power. They are obliged to reside in the place where they exercise their functions, which becomes their legal domicile.<sup>2</sup> The rules of admission require that the *agent de change* must be a French citizen, twenty-five years of age, and that he must produce a certificate of ability and integrity signed by the chief members of several banking and commercial houses in good standing. In Paris the presentation of the candidate by the *Chambre Syndicale* is addressed directly to the Minister of Finance.<sup>3</sup> The *agents de change* can present their successors, with the approval of the nominating power; but the government has expressly reserved the right to augment or reduce their number. In the event, however, of their number being increased, the new members would be obliged to pay a sum to be determined by the minister, to be distributed among the old members as an indemnity for the diminution of the value of their offices. On the other hand, if the number is decreased, it is the usage to fix an indemnification sum which shall be paid by the other members to their associate or associates who may retire at the instance of the government.<sup>4</sup> The *agents de change* are governed by seven of their members, elected annually, who are called *syndics*, and constitute the *Chambre Syndicale*. Before entering on his functions, the Broker must take an oath before the Tribunal of Commerce, in due form, and he must also pay into the treasury of the Bourse his *cautionment*, or guarantee, of 250,000 francs. Previous to 1862 this was only 125,000 francs, having been raised to that figure gradually in the course of time from very small amounts. In Lyons the

<sup>1</sup> Buchère, *Opérations de la Bourse*,  
30.

<sup>2</sup> *Id.* 31.

<sup>3</sup> *Id.* 32.

<sup>4</sup> *Id.* 31.



cautionment is only 40,000 francs; in Marseilles and Bordeaux, 30,000 francs; in Toulouse and Lille, 12,000 francs; and in the smallest Bourses as low as 4000 francs. The object of the cautionment is to secure the Clients of the Broker.<sup>1</sup> It is a pledge of the Broker's good conduct, and for the Clients' indemnification for any loss occasioned by the error or fault of the *agent de change*. It is, in fine, a fund held for any judgments that may be pronounced against him.<sup>2</sup> The cautionment must be kept intact.<sup>3</sup> Thus, for instance, if it should be adjudged that a Broker owed a Client 100,000 francs, and the Chambre Syndicale paid over that amount to the aggrieved party, the *agent de change* in question would be compelled, in order to retain his membership, to bring his cautionment again up to the full amount of 250,000 francs.

The *agent de change* is also required to contribute 50,000 francs to a common fund, which is called *caisse commune*, and which the Bourse employs in aiding and extricating from their difficulties such of its members as may, through no fault or wrong-doing of their own, find themselves in a temporarily embarrassed financial position.<sup>4</sup> And it seems that millions of francs have been spent by the Paris Bourse in this manner, only a portion of which has ever been repaid by the *agents de change*. This common fund, which was first instituted in 1819, has grown to be very considerable in amount; and, when not in use for its actual purposes, it is profitably employed by the governors, in their discretion, in time loans, effected through "turns" in stocks, by which it yields a very large interest to the Bourse.<sup>5</sup> The Chambre Syndicale, which administers the funds, makes a report twice a year to the Bourse

<sup>1</sup> Buchère, *Opérations de la Bourse*, 40, 41.

<sup>2</sup> Bédarride, *Droit Comm.* 173.

<sup>3</sup> *Id.* 174.

<sup>4</sup> *Id.* 174, 175.

<sup>5</sup> *Id.* 175.

as to the results of its operations, and a dividend from the profits is usually declared in July and December of every year.<sup>1</sup>

The *Chambre Syndicale* presides over the fortnightly settlements through two of its delegates appointed for the purpose.<sup>2</sup> Under a law enacted in 1816, the *Chambre Syndicale* has power to suspend a member pending their investigation into any charges which may have been brought against him, to impose a fine, or propose his expulsion, if they regard his offence as one of sufficient gravity for such an extreme measure. Its decisions, in cases of dispute between members, or between members and their Clients, are subject to appeal to the *Tribunal de Commerce*, if the question is one of civil jurisdiction, and to the action of the police authorities if a criminal offence is involved.

In a case decided in 1827, in which a Broker—Sandrié-Vincourt by name—had been expelled for having failed (his doubtful financial position having been brought to the attention of the *Chambre Syndicale* as early as 1822), the *Cour de Paris* decided that the *Chambre Syndicale* could not be held liable for not having suspended him sooner, and the court rejected the claim that the *agents de change* collectively, and the members of the *Chambre Syndicale* individually, were legally responsible for the loss inflicted upon the bankrupt Broker's creditors.<sup>3</sup>

Expulsion alone can deprive a member of his own right to present the name of his successor, and thus practically to sell his "seat."<sup>4</sup>

As must have been inferred from the above, the *agent de change* has a vested interest in the *Bourse*, of which, as already stated, only an expulsion for moral delinquency can de-

<sup>1</sup> Bédarride, *Droit Comm.* 176.

<sup>2</sup> Rules in Appendix.

<sup>3</sup> Bédarride, *Droit Comm.* 188, 189, 190.

<sup>4</sup> *Id.* 151.

prive him. As there are only sixty of these functionaries, they are generally men of large capital, doing a most extensive and valuable business.

In case of the Broker's failure, the creditors are entitled to present the name of his successor; and if the latter be approved by the Bourse and confirmed by the government, it is to him the creditors must look for their indemnification.

The same rule holds good in the case of the death of a member, where either the heirs or creditors, as the case may be, have the right to present a successor to the vacant seat; and the latter, if accepted, reimburses those presenting him for its value by the payment of such a sum as they may agree upon.

Proper caution is expected to be used by the *Chambre Syndicale* in placing new securities on the list; and in order that the Bourse may not be committed to the soundness of any new security, it is generally placed on the so-called "non-official" list until it shall have received the approval of the Ministry of Finance as being worthy of official quotation.<sup>1</sup>

The entirely inadequate number of *agents de change* for the immense transactions in stocks led to the formation of the *Coulisse*, comprising a vast number of unauthorized, or "curbstone," Brokers, as they are called in New York.<sup>2</sup> The word *coulisse*, in its ordinary theatrical sense, means the wings of the theatre hidden from the spectator's view, where the actors stand before coming on the stage.<sup>3</sup> Its curious application in designating the part of the Bourse unauthorized by law was, according to Frémery, derived in this manner: In one of the ancient places of réunion

<sup>1</sup> Bédarride, *Droit Comm.* 185, 186.

<sup>2</sup> "On appelle coulisse la réunion de spéculateurs qui négocient entre eux, ou par l'intermédiaire d'agents de change non-commissionnés, de nombreuses et souvent fort importantes

opérations en effets publics et rentes sur l'état" (Bédarride, *Droit Comm.* 104).

<sup>3</sup> Littré, *Dictionnaire de la Langue Française*, 841.

assigned to the Bourse, there was a passage separated by a partition from the space where the *commerçants* assembled. This passage extended to the very enclosure of the Brokers; and the men who made transactions with each other, without the intervention of the regular Brokers, habitually occupied it. It was called the *Coulisse*, and those frequenting it *coulissiers*.<sup>1</sup> The development of the *Coulisse*, which is as ancient as the Bourse itself, was at first strenuously combated by the regular Brokers. An edict of 1716 sought its suppression, followed by another several years later, which instituted the functions of the *agents de change*. Ten years later another royal decree was hurled against "the individuals without authority," to translate its language, "who introduce themselves in the Bourse under the title of *agents de change*, and make transactions between each other which are prejudicial to the integrity of commerce and the public safety."<sup>2</sup> But the *Coulisse* struggled with wonderful persistency against the attacks of the Bourse; and neither fines nor imprisonment, nor repeated prohibitions of its meetings by the government, could vanquish the irrepressible *coulissier*. The Revolution, with its destruction of monopolies, made the profession of *agent de change* free,<sup>3</sup> and the *Coulisse* then disappeared for a time; but as soon as the monopoly was re-established in the year 1801, it reappeared. The struggles of the *agents de change* against their unauthorized rivals—the *Coulisse*—were so unavailing for many years that down to 1859, when by a legal decision it was suppressed, it may be said to have enjoyed an almost official, though certainly somewhat troubled, existence. The government always took its severest measures against the *Coulisse*, and seemed to hold it responsible, when disastrous events produced a panicky decline in the public funds. Thus, in 1819, when,

<sup>1</sup> Larousse, *Dictionnaire Universel*, 307.

<sup>2</sup> Bédarride, *Droit Comm.* 105.

<sup>3</sup> Decree of March 17, 1791.

owing to legislative changes of a radical character and a deficit of one hundred millions in the budget, the five per cent. rente declined in a few days from 71 francs 50 centimes to 65 francs 10 centimes, the assemblages of the *Coulisse*, which then held its reunions in the *Passage des Panoramas*, were at once prohibited. The *Coulisse* then migrated to the *Boulevard de Gand* and to the *Café Tortoni*, and was allowed to remain unmolested for four years; but in 1823, when, owing to threatening political clouds, the five per cent. rente fell in eight days from 87 francs 65 centimes to 78 francs 30 centimes, the *Coulisse* was again held responsible, and visited with the severity of the *Tribunals*. In October, 1840, when the bombardment of *Beyrout* by the English fleet was commenced, the five per cent. rente fell from 106 francs to 101 francs, and the reunions at the *Café Tortoni* were again prohibited. A few days after a recovery began, and the *Coulisse* resumed its operations.<sup>1</sup>

In 1842 the *Bourse* formally instituted proceedings against the *Coulisse* before the *Préfet de Police*, who reported, however, to the *Ministry of Finance* that the *Coulisse* did not encroach upon the domain of the *Bourse*, because no stocks actually changed hands through their transactions, which were simply bets on what the price of a security at the *Bourse* would be on a given day.<sup>2</sup> In 1850, on the publication of an apocryphal message by the then President of the Republic, subsequently the Emperor *Louis Napoleon*, the rente fell, in the dealings of the *Coulisse*, 3 francs before the meeting of the *Bourse*, and once more the *Coulisse* was proscribed. But only eight days elapsed when it again reassembled in the *Casino de la Chaussée d'Antin*. This was its last sheltered asylum, from which it was driven in 1853, when a fall of 3 francs

<sup>1</sup> Larousse, *Dictionnaire Universel*, 307, 308.

<sup>2</sup> Bédarride, *Droit Comm.* 106.

in the dealings on the *Coulisse* greeted the first news of the departure of the French fleet for the East. Thence, until 1859, Paris beheld the spectacle of the *Coulisse* in full blast, in the mornings from 11 to 1, and in the evenings from 8 to 10, before the *Passage de l'Opéra*.<sup>1</sup>

This brings us to the critical year of 1859, when the *Coulisse* was suppressed by law; and it should be remembered that during all this time its transactions invariably required the co-operation of the regular *agents* if an actual transfer of stocks was to be effected. Every *agent de change* had his *coulissier*; and it was said to be a custom among the *agents de change*, if they received orders from their Clients which they regarded as ill-judged, to direct their *coulissiers* to purchase what they had sold, or to sell what they had bought, for their Clients.<sup>2</sup>

In 1859, through the instrumentality of the *Chambre Syndicale*, not less than twenty-six *coulissiers* were convicted of usurping the functions of the *agents de change*, and condemned to pay a fine of 10,500 francs each, and their appeal was rejected by the *Cour de Cassation*.<sup>3</sup> This was a very serious blow to the *Coulisse*, the history of which will always be one of the most interesting features of the record of the Paris Bourse. It had its own rules and usages, though these were of a far more informal character than those of the Bourse, and admission to its ranks was obtained by presentation by some of the older members, and the tacit consent to the reception of the new-comer by the others. When it was formally suppressed by the decision of 1859 above alluded to, it included the members of two hundred banking-houses of great solidity, and sixty of these occupied themselves solely with operations in

<sup>1</sup> Larousse, *Dictionnaire Universel*, 308. proceeding is called "discounting" or "coppering" a Client.

<sup>2</sup> M. Jeannotte Bozérain, *De la Bourse*, No. 145. In New York this

<sup>3</sup> Bédarride, *Droit Comm.* 108, 109.

rentes. The smaller commissions charged by the *coulissiers*, and their quicker mode of operating, had caused their transactions to grow so enormously as to overshadow those of the regular Brokers; but the decision of 1859 put an end to the *Coulisse*.<sup>1</sup>

In concluding this history of the *Coulisse*, it should be added that it still serves to this day for the vast minor operations on the *Petite Bourse*, where, in operations known as the *marché à prime*, much smaller margins are accepted than on the regular *Bourse*. The contracts are regulated from one day to another. Every afternoon at two o'clock all the little differences are adjusted, and an immense number of small speculators make contracts for the next day.<sup>2</sup> Indeed, the *coulissiers* still exist, but they occupy themselves almost exclusively with operations in securities not listed on the *Exchange*, and gambling on the *Petite Bourse*, which continues to hold its meetings outside the place and hours of the regular *Bourse*.<sup>3</sup>

Owing to the enormous growth of financial operations, it was found, however, indispensable to increase the number of persons allowed to exercise the functions of *agents de change*; and hence, by a decree made in October, 1859, each of these sixty functionaries was permitted to have one or two clerks, who, under the rules established by the *Chambre Syndicale*, might exercise the power of his employer at the *Bourse*.<sup>4</sup> By this means a legally constituted *Coulisse* was established, and each *agent de change* is to-day a trinity acting under a single name.<sup>5</sup>

The commissions of the *agents de change* are fixed by the *Chambre Syndicale*. They are regulated, not by the number

<sup>1</sup> Larousse, Dictionnaire Universel, 308.

<sup>2</sup> Id.

<sup>3</sup> Buchère, Opérations de la Bourse, 26.

<sup>4</sup> Bédarride, Droit Comm. 109.

<sup>5</sup> Id.

of shares purchased or sold, as in New York, but by the nominal value of the securities. For every 1000 francs (\$200) face value the commission is 1 franc 25 centimes (25 cents), or one-eighth per cent.; and for every security of a face value below 800 francs (\$160) the minimum commission of one franc is charged.<sup>1</sup> When, in the same Bourse, the Client makes a sale and a purchase, but one commission is charged—that upon the largest capital employed—which is called “*arbitrage*,” and the other is made free—“*franco*.”

### *III. Nature of Transactions.*

The transactions of the Paris Bourse are substantially similar to the dealings on the London Stock Exchange, except that the operations are more diversified. There are two settling-days each month.<sup>2</sup>

There are two principal species of securities dealt in on the Bourse—*les nominatifs* and *les porteurs*—viz., either registered or to bearer. The delivery of the security to bearer is a sufficient transfer of the property. For the registered securities the seller must sign a declaration which transfers the property to the buyer, whose name is mentioned on the declaration. These declarations, called “transfer-sheets,” are furnished by the companies, and can generally be sent to the seller for signature when he does not live in Paris, with the words “good for transfer,” written in his own handwriting, preceding his signature. But in those securities which require that the transfer should be signed on the books of the company, the seller must sign at the chief office or headquarters; or, if he does not live in Paris, he must send a power of attorney, with his securities, authorizing the person to whom they are sent to effect the transfer.

<sup>1</sup> See Rules of Paris Bourse, in Appendix.

<sup>2</sup> Id.



There is in French bonds a third species of security which partakes of the nature of the two former, and which, for that reason, is called "mixed securities." They are registered, and the title to them can only be transferred by a declaration signed by the seller; but they are furnished with coupons to bearer which can be detached from the security, and on the presentation of which the sum therein mentioned (*arrérages*) will be paid.

The transactions of the French Bourse are either for money or for the account, and in respect to the settlement or adjustment of the contracts do not substantially vary from the course of the London Exchange.

The most numerous dealings on the Bourse are for the account, and are settled by the payment of differences. These transactions are known under the general designation of "*des opérations à terme*." To sell or buy securities "*à terme*" indicates on the part of those who make the operation the intention to delay the execution of the contract until a determinate period. The time when contracts of this nature mature and are settled is known on the Bourse as "*liquidation*."

Ordinarily, in the past, there has been but one liquidation, which occurred at the end of the month. But when the financial or political situation is such as to create very active movements on the Bourse, two settling-days are resorted to for the greater number of securities, and this seems to have been the case for a long time past. These liquidations are had on the 1st and 16th of each month.<sup>1</sup>

The operations *à terme* may be made at the option of the Client either for the ensuing liquidation or for any following. And these operations can be made for a term longer than is embraced within the next ensuing settling-days: thus, in the case of securities for which monthly settling-

<sup>1</sup> Rule 66 of Paris Bourse.

days are fixed, the liquidation can be deferred beyond that period, while the same holds good with reference to those securities for which two settling-days per month are allowed.

The operations *à terme*, or for the account, are of two species—"les marchés *à ferme*" and "les marchés *à prime*."

To buy or sell *ferme* is where one binds himself to receive or deliver, upon a certain day, a designated number of shares at a fixed price. The vendor rarely possesses the shares which he agrees to sell, and the buyer has not sufficient capital to pay for the shares purchased; and hence both expect to settle the transaction by the payment of differences. In this species of operations the loss is not limited, but is subject to the extremest fluctuations of the market.<sup>1</sup>

The operations *à prime*, on the other hand, are those where the loss is limited to a fixed sum. The contract is *à prime* whenever the price is followed by the word *dont*. For instance, A buys fifty shares *à terme* at the price of 1055 francs each, "*dont 10*." This means that A's loss is limited to 10 francs per share; for if at the expiration of the contract the shares should be worth only say 1030 francs each, A can abandon the *prime* at a loss of 500 francs; whereas, if the operation had been *ferme*, he would have lost 1250 francs.<sup>2</sup>

The "*réponse des primes*" is the declaration by the buyer of his intention, or not, to avail himself of his option. If the transaction is maintained, the purchase becomes fixed, "*un achat ferme*." On the Paris Bourse, however, there is no formal declaration, as the official quotations are regarded as indicating of themselves the intention of the buyer.<sup>3</sup>

These contracts are mere options, and this entire system of

<sup>1</sup> Bédarride, Droit Comm. 101.

<sup>2</sup> Id. 103.

<sup>3</sup> Id. 101, 102.

dealings has been assailed as illegal and pernicious. It is related that when Napoleon I. had before him one of the governors (syndic) of the Bourse, this functionary, in defending its operations, said: "Sire, if my water-carrier is at my door, would he commit a wrong in selling me two barrels of water instead of only the one which he has with him? Of course not, because he is always certain to find another barrel of water in the river. Well, sire, at the Bourse there is a river of *rentes*."<sup>1</sup> But, notwithstanding the attacks upon these option contracts, the Cour de Cassation, in 1860, finally decided that the dealings on the Bourse for future delivery are valid, provided that an actual delivery of the securities is contemplated, and they are not made as mere pretexts for gambling operations. And in this respect the French law agrees with the doctrine laid down by the courts of England and the United States.<sup>2</sup>

There are various other operations, a full description of which would, however, exceed the space assigned to this chapter. One of the most popular is the *report*. The *report* indicates an operation which consists of a simultaneous purchase and sale for different periods of time, and assimilates itself to what is commonly known in New York as the "turning" of stocks. Thus a capitalist who on the same day buys *rente* for 69 francs, cash, and sells it at 69 francs 45 centimes, payable at the end of the month, will gain the difference between the two amounts as the interest on his money. Again, speculators often desire to prolong their operations beyond the settling-day, and then the Brokers, who make this branch of operations a specialty, will renew or carry over the contract on the payment by the operator of a certain difference called *report*.<sup>3</sup> In the latter sense, the *report* would seem to corre-

<sup>1</sup> Bédarride, Droit Comm. 81.

<sup>2</sup> Id. 108.

<sup>3</sup> Dictionnaire de la Conversation, 604.

spond to what in England is known as the "carrying rate" for stocks.

As the *cours moyen*, or average market price, of any security on a given day is of great importance in adjusting settlements, the rule has been established that the average between the highest and lowest prices of the day shall be considered the *cours moyen*.<sup>1</sup>

<sup>1</sup> Larousse, Dictionnaire Universel, 1144.

## CHAPTER VII.

## USAGES OF STOCK-BROKERS.

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- I. General Rules relative to Usages.*  
*II. Cases in which Usages of Stock-brokers held Binding.*  
    (a.) *In the United States.*  
    (b.) *In England.*  
*III. Cases in which Usages have been Rejected.*  
    (a.) *In the United States.*  
    (b.) *In England.*
- 

*I. General Rules relative to Usages.*

A rule of law laid down in the elementary works as being well settled is, that a contract should be interpreted in accordance with the intention of the parties thereto, and that the "usage" or "custom" of any particular trade, occupation, business, or place, when it is reasonable, uniform, well settled, and not in opposition to fixed rules of law or in contravention to the express terms of a contract, is deemed to form a part of the contract and to enter into the intention of the parties.

There are different kinds of customs, such as the custom of merchants, *lex mercatoria*, which is recognized by the law of the land; but the "usages" of which we treat in this chapter must be proved as any other facts, and, when proved, may be used as presumptive evidence to establish the contract.<sup>1</sup> Mr.

<sup>1</sup> Starkie on Ev. 455; Maxted vs. 2 Phillips on Ev. (Cowen's, Hill's, and Paine, L. R. 4 Ex. 81; id. (2d case) 205; Edwards's notes, 4th Am. ed.) 726; 2

Justice Brett, in a case<sup>1</sup> which powerfully illustrates the connection between the usages of trade and the law, said: "Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application which has been laid down by the courts of some rule of law to business, and which application has seemed irksome to some merchants. And, when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be whether it is in accordance with fundamental principles of right and wrong. The mercantile custom is hardly ever invoked but when one of the parties to the dispute has not, in fact, had his attention called to the course of business to be enforced by it; for if his attention had, in fact, been called to such course of business, his contract would be specifically made in accordance with it, and no proof of it as a custom would be necessary. A stranger to a locality or trade or market is not held to be bound by the custom of such locality, trade, or market because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market wherein all who are not strangers do know and act upon such custom. Where considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favor of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavoring to enforce some rule of conduct which is so entirely in favor of their

Pars. on Cont. (6th ed.) 535; 1 Greenleaf on Ev. § 292, 294; Starkie on Ev. 637, 710; Broom's Leg. Max. 682, 889, 890; Walls vs. Bailey, 49 N. Y. 464. See also a recent work, Law-son on Usages, 287, 288, where the law on this subject is exhaustively discussed, and all of the cases referred to.

<sup>1</sup> Robinson vs. Mollett, L. R. 7 H. L. Eng. & I. App. Cas. 802, 816.

side that it is fundamentally unjust to the other side, the courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void."

It will be the object of the present chapter to ascertain how far these general views and the principles hereafter set forth have been introduced into cases arising out of transactions between Stock-brokers and their Clients; and it will be seen, in the application of these general principles to the facts, that the courts have exercised a very wide range of discretion, and that their conclusions have not by any means been uniform or harmonious.

The importance of allowing the introduction of usages of Stock-brokers in all cases arising out of transactions on the Stock Exchange cannot be overestimated. The business of buying and selling stocks, although of modern origin, has grown to be one of gigantic magnitude, employing yearly more capital, perhaps, than any other commercial pursuit.

As the system of conducting a transaction in stocks is *swi generis*, the usages of the business have generally arisen out of its necessities, and to fail to give effect to them in a litigation is practically to determine it upon principles and facts which have no existence in the original transaction. In truth, it is entirely impossible to make out or understand intelligently an ordinary transaction, either of the London or the New York Stock Exchange, without the aid of these usages. The time required to make a sale of securities at either of these places is but momentary. It often happens that barely a half-dozen words are spoken in a transaction: a nod, the raising of a hand, or other signs and ejaculations, are frequently used to bind a buyer or seller to a contract embracing thousands of shares of securities. One transaction is the representative of thousands. Very often the Brokers make

no memorandum of the business, or, when one is made, it is apt to be of the scantiest character and utterly decipherless without the explanation of persons acquainted with the course of dealing on the Exchange. What actually transpires between the buying and selling Brokers constitutes, it may be, but the framework of the transaction, and an intelligible, full, living agreement can only be made out by a resort to other evidence, involving, perhaps, not only a consideration of the rules of the Stock Exchange, but of the unwritten usages, so to speak, of the Brokers.

With these preliminary observations, we shall proceed to state certain general rules which have been established by the courts upon the doctrine of usage, together with such criticisms upon them as seem reasonable and appropriate.

*First.* It may be laid down as a proposition well settled in the law that the usage of a business is never permitted to make an *entire* or *new* contract for the parties. What usage does is to take a contract which is deficient and incomplete in its terms or expressions, and supply the omissions; and, unless some contract is shown, evidence of usage or custom is immaterial.<sup>1</sup>

*Second.* So the usage of a business plays an important part in the interpretation of technical words and phrases in a contract, because, if language is employed which is only known in a certain business, the law, to enlighten itself as to what is meant by the contract between the parties, invites individuals skilled in that business to explain or unlock the meaning of the terms used. This branch of the law is also comparatively uniform and clear.

*Third.* Another rule is also well settled—viz., that a written and express contract cannot be contradicted or varied by

<sup>1</sup> *Tilley vs. County of Cook*, 103 30 How. (N. Y.) Pr. 117; *Parsons vs. U. S. Rep.* 155; *Lombardo vs. Case*, *Martin*, 77 Mass. 111.



usage, *i. e.*, where the terms of a contract are full and complete and can be deciphered by the courts without resort to extrinsic evidence; as where A., of New York, agrees to sell B, of the same place, ten barrels of flour, each barrel to weigh one hundred pounds: here an offer to show that the ordinary barrels of flour known among the flour trade of New York weigh only ninety pounds could not be received. So that evidence of usage is generally receivable only in cases where the contract, whether written or oral, is doubtful, incomplete, or deficient, or where technical terms or phrases are to be translated.

*Fourth.* A statement is frequently met with in the elementary treatises and in adjudicated cases, that usage, when it is not in opposition to "fixed rules of law," and is not unreasonable, is deemed to form a part of the contract, and to enter into the intentions of the parties thereto.<sup>1</sup> What is the meaning, in this connection, of the phrase "fixed rules of law?" If by such expression it is meant that all usages of business contrary to the express prohibitions of statutes are void, the proposition can perhaps be easily sustained; for no usage can, or should, have the force and effect of a legislative enactment. And for the same reason contracts, either express or implied, are void if they conflict with similar statutes. But there are a great many contracts contrary to the "fixed rules of law" which are valid, and which are made for the express purpose of evading or avoiding the rules of the law. For instance, it seems to be well settled in the State of New York that where A pledges stock or securities for the payment of a loan, so that a pledge is created, B, before he can sell the same, must demand payment, and, upon default, give A reasonable notice of time

<sup>1</sup> Starkie on Ev. 637, 710; Williams vs. Gulinan, 3 Greenl. 276; Walls vs. Bailey, 49 N. Y. 464.

and place of sale.<sup>1</sup> This principle seems to be a "fixed rule of law;" in fact, all the principles of law are "fixed rules." The fundamental essence of a law is its fixity. Law is a rule, to distinguish it from *advice* or *counsel*, which one is at liberty to follow or not as he sees proper; it is also a rule, to distinguish it from a *compact* or *agreement*, the latter being nothing but a promise proceeding from us, whereas the law is a command directed to us: its language is, "Thou shalt or shalt not do this."<sup>2</sup> But this rule, in relation to a pledge, may be waived by the pledgor, so that the pledgee may sell without notice. The former can make a contract by which he agrees to allow B, in default of payment, to sell the stocks without notice of any kind, at any place, and such a waiver is entirely legal.<sup>3</sup> Here we find a "fixed rule of law" set aside at the option of the parties to an agreement. Can A, by an implied contract, do that which he can do by an express contract? It is just here that the difficulty arises in the application of the doctrine of usage to contracts. For if a usage exist in a certain locality, or among a certain class of merchants or traders, which does not conflict with the prohibitions of a statute, or which is not *contra bonos mores*, or contrary to public policy, but which merely extends or limits a principle of commercial law, or a "fixed rule of law," and parties contract with a knowledge of the usage, why should it not be presumed that it entered into their intentions, and that they have made it a part of their contract to the same extent as if they had specifically embodied it in the instrument?

In *Markham vs. Jaudon*,<sup>4</sup> evidence was offered to prove the existence of a usage in the city of New York by which Brokers have the right to sell out the Client's stock on the exhaustion of the margin, without notice to the latter. The

<sup>1</sup> *Markham vs. Jaudon*, 41 N. Y. 235.

<sup>3</sup> *Markham vs. Jaudon*, *supra*.

<sup>2</sup> Blackstone's Com. (Sharswood's ed.) \*45.

<sup>4</sup> 41 N. Y. 245.

appellate court held that such evidence was legally rejected upon the ground *that it was in hostility to the terms of the contract*. If it were so, unquestionably the usage should have succumbed to the plain agreement of the parties. But there was no written contract in the case, and the conclusion was based upon the general principles of the law relating to the subject of pledges.

Ordinarily, of course, where persons do not specifically agree upon the terms of a contract, the presumption is that they contract with reference to the existing law, and the contract will be enforced according to prevailing principles; but where a usage exists with reference to which parties are assumed to contract, why should not this usage be imported into the contract, with the result of varying the "fixed rules of law," to the same extent as if an express understanding had been entered into?

In the case in question, it was not disputed but that the Client could have waived his right to demand notice. Did he not, by entering into a transaction with a Stock-broker, adopt as part of the business the usages which prevail among Brokers, respecting the sale of securities held under the circumstances there disclosed? There were two dissenting opinions in that case,<sup>1</sup> which held that such evidence was admissible, on the ground that it explained a doubtful contract. And it has been directly decided in England that a usage of the Stock Exchange to close an account before the account-day, where the Client becomes insolvent, should be upheld as a reasonable and just usage;<sup>2</sup> although it must be confessed that this case is weakened by the intimations of the court that, if the account is summarily closed before the account-day, the Broker is liable to indemnify the Client if the

<sup>1</sup> Grover and Woodruff, JJ.

<sup>2</sup> Lacey vs. Hill (Scrimgeour's Claim), L. R. 8 Ch. App. 921.

market changes in favor of the latter on the last-named day.<sup>1</sup> As we have said, a fixed principle or rule of law may be expressly waived. So, even in cases where the legislature has regulated the law of a certain subject by statute, parties may contract to avoid its effect, and such contracts are perfectly legal. Many statutory provisions are merely declaratory of the common-law, and are made to govern cases where parties have not entered into any agreement in reference thereto.

For instance, if an act of the legislature of a state specifically allows three days' grace on negotiable instruments (and we use this illustration because it is made in the case of *Markham vs. Jaudon*<sup>2</sup> by the learned judge who delivered the opinion of the court), a promissory note which should, on its face, state that it was to be without days of grace would be perfectly valid, because the party had chosen to waive the benefits of the existing law. And if there exist a known usage among the merchants of a certain place to allow no days of grace, would not such a usage bind a person who executed a note and made it payable at such place? Would he not be presumed to have made the instrument with express reference to such usage? The courts of Pennsylvania and California say that he would.<sup>3</sup>

So a custom on the part of all the banks of a particular place to demand payment and give notice to endorsers of negotiable paper on the *fourth* day of grace is binding on an endorser if known to him.<sup>4</sup> And the reasoning of the Supreme Court of the United States shows the fallacy of the argument used in the case of *Markham vs. Jaudon* to reject the usage there

<sup>1</sup> But see *Colket vs. Ellis*, 10 Phila. (Pa.) 179; *Champion vs. Gordon*, 70 (Pa.) 375; s. c. 32 Leg. Int. (Pa.) 82; Pa. St. 476; *Minturn vs. Fisher*, 4 Corbett vs. Underwood, 83 Ill. 324. Cal. 35.

<sup>2</sup> 41 N. Y. 235.

<sup>3</sup> *Lawson vs. Richards*, 6 Phila. Wheat. 582. <sup>4</sup> *Renner vs. Bank of Columbia*, 9

sought to be upheld. And the general principles of law relating to the time and place of demand and notice in the case of notes and bills may be overruled by usage.<sup>1</sup>

The Supreme Court of the United States, in *Barnard vs. Kellogg*,<sup>2</sup> decided a question which strongly illustrates the general subject. There it was held that the well-known rule of *caveat emptor* could not be affected by a local custom by which the seller was made to warrant the quality of the goods; but the learned judge who delivered the judgment of the court, in concluding his opinion, laid great stress upon the fact that it appeared the parties had *no knowledge* of the custom invoked.

A still further and more ambiguous limitation of the doctrine of usages, in their influence upon contracts, was made by Mr. Justice Brett, in the case of *Robinson vs. Mollett*,<sup>3</sup> where he said: "So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom," but that "customs fundamentally unjust, if sought to be enforced against persons ignorant of them, are void."

In that case a usage was attempted to be introduced which allowed a Broker, commissioned to purchase certain merchandise for his principal, to become himself the purchaser. The order to purchase was given by a Liverpool merchant to a London tallow-broker, and the usage pertained to the London tallow market; but the principal was not shown to have had any knowledge of the usage; and upon the ground of the principal's ignorance of the same it was rejected. The

<sup>1</sup> See article "The Power of Usage and Custom," by John D. Lawson, Esq., 7 South. L. Rev. 43; see also *Bowen vs. Newell*, 4 Seld. 190, 3 Kern. 290, where the usage of the banks of Connecticut, to regard checks payable after date as not entitled to days of grace, was held admissible.

<sup>2</sup> 10 Wall. 383.

<sup>3</sup> L. R. 7 H. L. Eng. & I. App. Cas. 802, 816; see also *Tilley vs. County of Cook*, 103 U. S. Rep. 161, where the court say that *absurd* and *unreasonable* customs are not binding.

learned judges who delivered opinions in the case did not pass upon the question as to the influence of such a usage upon a contract made by persons having knowledge thereof; but it is not difficult to perceive that, if such knowledge had been shown, the case would have been differently determined.

Without pursuing the subject further, it seems to us that harmony can only be reached in this branch of the law by keeping in constant view the distinction between contracts void in law and those which are valid.

In the former class, whether the contracts are void because made so by statute, or are against public policy, the law will not enforce them. In the latter class, embracing all contracts not included in the former, agreements will be enforced, although they contravene fixed rules of the law merchant, or common-law, and frequently statutory provisions.

As usage is considered a portion of the contract between the parties, it would seem to follow logically that it should be sustained in every instance where an express contract is upheld, providing, of course, the evidence is sufficient to show that the parties had knowledge of such usage.

In fine, whenever an express contract is valid, a known usage, which is but another way of proving what the parties intended and agreed upon, should be declared equally so.<sup>1</sup> There is one answer which may be made to this conclusion—viz., that “public policy” requires, where parties assume obligations which the law does not impose, or release obligations which it does impose, it should be done by *express* contract.

This view was advanced by Chapman, J., in a case where a

<sup>1</sup> These views, since they were written, have received a powerful endorsement from two elaborate and able articles on the “Power of Usage and Custom,” by John D. Law-son, Esq., of the Missouri Bar, 7 South. L. Rev. (n.s.) 1; 6 id. 845; see also Colket vs. Ellis, 10 Phila. (Pa.) 375; s. c. 32 Leg. Int. (Pa.) 82.

usage was set up that certain goods were always sold with a warranty, where the law implied none.<sup>1</sup> The learned judge said: “. . . If the parties agree that there shall be a warranty where the law implies none, they can insert the warranty in the bill of sale; or if the manufacturer sells without warranty, he can so express it. But if such usages were to prevail, they would be productive of misunderstanding, litigation, and frequent injustice, and would be deeply injurious to the interests of trade and commerce. They would make it necessary to prove the law of the case by witnesses on the stand, and it would be settled by the jury in each particular case;” and he concludes that “public policy” requires that such usages should be expressly incorporated in contracts.

The exclusion of usage on the ground of “public policy” invokes an argument which we have not discovered in many cases; and, if it were well-founded, it would require the rejection of all usages, because it would apply to all with the same force that it did to the one set up in the case in question. And this mere statement would seem to be all the answer which such an argument requires. There is another complete answer, however—viz., that a large number of the many contracts which come before the courts are proved by parol; and there is no more practical difficulty in proving usages, which are but portions of contracts, than there is in proving any other terms or stipulations expressly agreed upon by the verbal utterances of parties.

*Fifth.* The rule has been established, in a large number of cases, that where one employs a Broker he is presumed to authorize him to deal with reference to the custom of Brokers; and that a Stock-broker, in the execution of his orders, has an implied authority to follow the rules and usages of the Stock Exchange.<sup>2</sup>

<sup>1</sup> Dickinson vs. Gray, 89 Mass. 29.

<sup>2</sup> Sutton vs. Tatham, 10 Ad. & E.

In England, this rule was first clearly laid down in the case of *Sutton vs. Tatham*,<sup>1</sup> where Lord Denman said: "I think a person employing one who is notoriously a Broker must be taken to authorize his acting in accordance with the rules of the Stock Exchange."

This rule was recently reiterated in the House of Lords by Mr. Justice Cleasby in *Robinson vs. Mollett*,<sup>2</sup> and limited in certain particulars which are important to notice: "I quite agree that by employing the Broker, who acts upon a particular market, you authorize him to make contracts upon all such terms as are usual upon the market, otherwise his hands would be tied, and he might not be able to contract at all. *Therefore, as regards all such matters as the time and mode of payment, the time and mode of delivery, the various allowances to be made, the mode of adjusting disputes as to quality, and all such matters as arise upon the contract made in the market, the principal would be bound by the usage; but not, I apprehend, because he must be supposed to have made inquiries and to have known them, but for the reason given by Mr. Justice*

27; *Pollock vs. Stables*, 12 Q. B. 765; *Hodgkinson vs. Kelly*, L. R. 6 Eq. 501; *Mitchell vs. Newhall*, 15 M. & W. 308; *Smith vs. Lindo*, 5 C. B. (n. s.) 587; *Mortimer vs. McCallan*, 6 M. & W. 58-61; *Magee vs. Atkinson*, 2 id. 440; *Lloyd vs. Gilbert*, 25 L. J. Q. B. 74; *Nickalls vs. Merry*, L. R. 7 Eng. & I. App. Cas. 530; *Bayliffe vs. Butterworth*, 1 Ex. 425; *Higgins vs. Senior*, 8 M. & W. 834; *Stray vs. Russell*, 29 L. J. Q. B. 279; *Lacey vs. Hill*, L. R. 8 Ch. App. 921; *Coles vs. Bristowe*, L. R. 4 C. P. 36; *Cruse vs. Paine*, L. R. 4 Ch. App. 441; *Johnson vs. Osborne*, 11 A. & E. 549; *Maxted vs. Paine*, L. R. 4 Ex. 81; id. (2d action) 205; notes to *Wigglesworth vs. Dallison*, 1 Sm. L. C. 843-857 (6th ed.); *Stewart vs. Canty*, 8 M. & W. 160; *Robinson vs. Mollett*, L. R. 7 H. L. Eng. & I. App. Cas. 802-826; *Westropp vs. Solomon*, 8 C. B. 345; *Adams vs. Peters*, 2 C. & K. 723; *Marten vs. Gibbon*, 33 L. T. (n. s.) 561; *Nourse vs. Prime*, 4 Johns. Ch. 490; s. c. 7 id. 69; *Horton vs. Morgan*, 19 N. Y. 170; *Lawrence vs. Maxwell*, 53 id. 19; *Whitehouse vs. Moore*, 13 Ab. Pr. 142; over-ruled on other points, *White vs. Baxter*, 9 J. & S. (N. Y.) 358; aff'd 71 N. Y. 254; *Kingsbury vs. Kirwin*, 11 J. & S. (N. Y.) 451; aff'd 77 N. Y. 612; *Walls vs. Bailey*, 49 id. 464, 473; *Rosenstock vs. Tormey*, 32 Md. 169; *Sumner vs. Stewart*, 69 Pa. St. 321; *Durant vs. Burt*, 98 Mass. 161. See also cases cited in Ch. V., where the question as to liability for calls is discussed.

<sup>1</sup> 10 Ad. & E. 27.

<sup>2</sup> L. R. 7 H. L. Eng. & I. App. Cas. 802-806.



Willes—because they were within the authority conferred upon his agent.”

In the United States, this rule seems to have been first applied in the case of *Nourse vs. Prime*,<sup>1</sup> decided by the Court of Chancery of the State of New York, in the year 1820, where it was held that Stock-brokers purchasing stocks for their Clients, and holding them as collateral security for the repayment of the purchase-money, need not keep on hand the identical shares purchased, but that the usages of Brokers, which impliedly become a part of the contract, authorize them to use such stocks in their business, keeping on hand an equal number of similar shares ready for delivery to their Clients.

*Sixth.* And the general rule last stated does not relate solely to dealings between Brokers and their Clients; but it applies to dealings between themselves, and they are presumed to know the usages of their own business.<sup>2</sup>

From the cases cited under the two general rules last mentioned, it appears that the Client is bound, whether he knows the usage or not; and here we find a decided exception to the general rule, which requires that one can only be bound by a usage of which he is shown to have knowledge. By employing a member of the Stock Exchange to transact business, one must necessarily give him the means to carry it through, which can only be done by making the transaction in accordance with the course of business there prevailing, founded upon the rules and usages of the Exchange; and hence such a person cannot avail himself of his supposed ignorance of the mode of dealing there prevailing.<sup>3</sup>

<sup>1</sup> 4 Johns. Ch. 490; 7 id. 69.

<sup>2</sup> *Durant vs. Burt*, 98 Mass. 161; *Colket vs. Ellis*, 10 Phila. 375, s. c. 32 Leg. Int. (Pa.) 82; *Hoffman vs. Livingston*, 14 J. & S. (N. Y.) 552. So the rules of the N. Y. Gold Exchange are binding upon its mem-

bers, and its constitution and by-laws become part of their contracts with each other (*Peabody vs. Speyers*, 56 N. Y. 230).

<sup>3</sup> See particularly, on this point, remarks of Pollock, C. B., in *Mitchell vs. Newhall*, 15 M. & W. 308; Pol-

There may arise cases in which the courts will not apply the two general rules which we have just laid down, without some evidence that the party sought to be affected by the usages had knowledge of them; but they may confine their application to the cases embraced in the remarks of Mr. Justice Brett in *Robinson vs. Mollett*, heretofore cited.

*Seventh.* The proof that a party to a contract had knowledge of a usage need not be direct. It may be proved, like any other fact of this description, by presumptive evidence; by the circumstances surrounding the transaction.<sup>1</sup> In *Stewart vs. Cauty*<sup>2</sup> the rules of the Liverpool Stock Exchange were admitted in evidence as the best means of showing what was the understanding of the parties in the contract in question by "reasonable time" for its completion.

*Eighth.* The usages of a particular Broker, firm, or business may also be introduced to interpret or govern a contract when they are known to the party sought to be charged with the same.<sup>3</sup> In *Baker vs. Drake*<sup>4</sup> the plaintiff employed defendants to purchase stocks for him upon margin, he agreeing, in writing, that all the transactions should be in every way subject to the usages of defendant's office. In an action for a conversion by an alleged sale without notice of stocks purchased, defendants offered to prove that it was the custom of

*lock vs. Stables*, 12 Q. B. 765; *Bayliffe vs. Butterworth*, 1 Ex. 425; and see also *Maxted vs. Paine*, L. R. 4 Ex. (2d action) id. 203. As to its being unnecessary to set up in a pleading against a client that he had knowledge of the existence of the usages of Brokers, see *Whitehouse vs. Moore*, 13 Ab. (N. Y.) Pr. 142. The general doctrine, however, of this case, while perhaps overruled by *Stenton vs. Jerome*, 54 N. Y. 480, is not affected in the above respect. See also *Miller vs. Insurance Co.*, 1 Ab. New Cas. 470.

<sup>1</sup> *Stewart vs. Cauty*, 8 M. & W. 160. To charge any person, however, with a custom confined to any particular house in any particular trade, it must be shown that he had express knowledge of the same (*Moore vs. Voughton*, 1 Stark. 487; *Scott vs. Irving*, 1 B. & Ad. 605; *Stewart vs. Aberdeen*, 4 M. & W. 211).

<sup>2</sup> *Supra*.

<sup>3</sup> *Baker vs. Drake*, 66 N. Y. 518; *Loring vs. Gurney*, 22 Mass. 15; see also cases cited under Rule VII. in note.

<sup>4</sup> 66 N. Y. 518.

their office to sell on account of failure to furnish sufficient margin at the Stock Exchange without giving notice to the Client of the time and place of sale. This offer was rejected, and the appellate court held that such rejection was error. The court, in the prevailing opinion (there being three out of the seven judges who dissented), expressly adhered to the decision in *Markham vs. Jaudon*,<sup>1</sup> that oral proof of the usage of Brokers in such cases is not admissible to add to or make part of the contract; but held that inasmuch as the paper had been admitted in the case without objection, by which the Client agreed that all transactions in stocks should be in every way subject to the usages of the defendant's office, such paper must be construed, and that parol proof was admissible to explain what those usages were; and that if parol proof should show that it was a usage of the defendant's office for want of a margin to sell stocks in pledge at the public Board of Brokers, without notice to the pledgor of the time or place of sale, such proof tended to establish an agreement to that effect, and that such an agreement would not contravene any statute nor infringe upon public policy.<sup>2</sup>

*Ninth.* On the other hand, a Broker cannot bind his Client without his express agreement by transacting business, committed to him, in any other than the ordinary and customary method.<sup>3</sup>

*Tenth.* Although it is in general the province of a court to construe a *written* instrument, the construction of a particular mercantile expression therein is for the jury.<sup>4</sup>

<sup>1</sup> 41 N. Y. 235.

W. 755; *Hoffman vs. Livingston*, 14

<sup>2</sup> See also, in this connection, *Colket vs. Ellis*, 10 Phila. (Pa.) 375; s. c. 32 Leg. Int. 82.

J. & S. (N. Y.) 552.

<sup>3</sup> *Wiltshire vs. Sims*, 1 Campb. 258; *Brown vs. Boorman*, 11 Cl. & Fin. 1; *Maxted vs. Paine*, L. R. 4 Ex. 81; *Maxted vs. Morris*, 21 L. T. (n. s.) 535; *Fletcher vs. Marshall*, 15 M. &

<sup>4</sup> *Chitty on Cont.* 82; *Smith vs. Blandy*, Ry. & M. 260; *Hutchinson vs. Bowker*, 5 M. & W. 540; *Smith vs. Bouvier*, 70 Pa. St. 325; *Dawson vs. Kittle*, 4 Hill, 107; *Goodyear vs. Ogden*, id. 104.

*Eleventh.* In respect to proving a commercial usage, it has been held that one witness is sufficient to establish the same, if his means of knowledge are abundant and his testimony full and satisfactory.<sup>1</sup> With this preliminary statement of some of the leading general principles governing usages, we shall now proceed to set forth the most prominent cases in both countries relating to Stock-brokers in which their usages have been sustained and rejected, with such comments as the circumstances seem to call for in the light of these general rules.

## *II. Cases in which Usages of Stock-brokers held Binding.*

### *(a.) In the United States.*

In the State of New York, the first case in which the usage of Stock-brokers was sustained is *Nourse vs. Prime*, to which we have already referred.<sup>2</sup> That case was followed in *Horton vs. Morgan*,<sup>3</sup> where the plaintiff had ordered the defendant, a Stock-broker, to purchase stock for him at the New York Stock Exchange, advancing part of the money as margin to pay for the same, the Broker making up the balance from his own funds. It appeared that defendant did not keep the identical stock on hand which he had purchased, but, upon demand of his Client, sent to him certificates in the name of his clerk, with blank powers of attorney signed by the latter. It was proved by Brokers that purchases of stock at the Board

<sup>1</sup> *Vail vs. Rice*, 5 N. Y. 155; *Thomas vs. Graves*, 1 Mill (S. C.), Const. Rep. 150; *Parrot vs. Thatcher*, 26 Mass. 426; *Patridge vs. Forsyth*, 29 Ala. 200. Some cases, however, hold that one witness is not sufficient to prove a custom—*Bissell vs. Ryan*, 23 Ill. 566; *Wood vs. Hickok*, 2 Wend. (N. Y.) 501; *Halwerson vs. Cole*, 1 Spears (S. C.), 321. But an isolated instance is not sufficient to prove a custom, nor will evidence of the custom of one person be sufficient to establish a general course of trade (*Burr vs. Sickles*, 17 Ark. 428; *Cope vs. Dodd*, 13 Pa. St. 33; *Adams vs. Otterback*, 15 How. (U. S.) 539).

<sup>2</sup> *Ante*, pp. 145, 353.

<sup>3</sup> 19 N. Y. 170.

of Brokers were always made in the name of the Broker without disclosing his principal's name, and that his liability to his principal was limited to transferring to him the required number of shares when called upon, without regard to the particular or identical shares bought.

The court, on appeal, held that this practice, by which Brokers only, and not their Clients, are known in their dealings with each other, was not unreasonable; and the plaintiff, by directing the purchase to be made, must be understood as consenting that it should be done in the usual manner; and that the plaintiff had no interest in having his shares kept separately from the mass of defendant's stock, one share being precisely equal in value to every other share.<sup>1</sup> Although the court in this case expressly refrained from passing upon the question whether a usage of Stock-brokers to use or hypothecate stocks held by them on margin for their Clients was valid, there is abundance of reason and authority for sustaining such a usage.<sup>2</sup> And it has also been held in New York that the rules of the Board of Brokers are binding upon third persons who employ members thereof to make transactions with other Brokers relative to stocks. And, accordingly, where W. and C., being members of the Open Board of Brokers, and W. as Broker of B., but in his own name, entered into a contract with C. for the sale of certain stocks, according to the rules of the Exchange, of which B. had knowledge, and thereafter, under the rules, C. called on W. for further margin; whereupon W. notified B., and reminded him that he would be liable to suspension if he did not comply;

<sup>1</sup> The principle of these cases has been several times reaffirmed in N. Y.; see Ch. III. p. 145.

<sup>2</sup> *Lawrence vs. Maxwell*, 53 N. Y. 19, and also cases collected in Ch. III. at p. 145. As to how far evidence is admissible to show that a Client may be bound, when he refuses to put up additional margins, by a usage of Wall Street authorizing a settlement of his account at private instead of public sale, see *Cameron vs. Durkheim*, 55 N. Y. 425.

and B. then agreed that if W. would not put up the margins he would protect him against all loss which should ensue from such refusal, and if he was suspended, would pay him during the time of his suspension from the board at a rate equal to the average business of W. for the previous year, with 10 per cent. added thereto; and W. did refuse to put up the margin, and was suspended—held, that he could recover from B. under this agreement; that there was sufficient mutuality and consideration, and the same was perfectly valid.<sup>1</sup>

*Baker vs. Drake*,<sup>2</sup> which has been fully noticed under the *eighth* general rule,<sup>3</sup> should here be alluded to as further extending the law of usage, and laying down the precedent that parties may also be bound by the usages of a particular Broker's office.<sup>4</sup>

So a Client engaged in speculative purchases and sales of cotton was held to be presumed to know the usages in respect to Cotton-brokers and the Cotton Exchange; and it being shown that he had had previous dealings in the business, he was not permitted to set up ignorance of the meaning of the term "closing-out," and the mode in which it was done.<sup>5</sup>

Pennsylvania also furnishes a very strong precedent for upholding the usages of Brokers in the case of *Colket vs. Ellis*.<sup>6</sup> There, the parties being members of the Philadelphia Stock Exchange, the plaintiffs borrowed on "call" a sum of money from defendants, depositing as collateral security certain

<sup>1</sup> *White vs. Baxter*, 9 J. & S. (N. Y.) 358; aff'd 71 N. Y. 254. See also, for other cases in which usages of Brokers have been upheld, *Whitehouse vs. Moore*, 13 Ab. (N. Y.) Pr. 142, which in the main, however, is overruled by *Baker vs. Drake*, 66 N. Y. 518, 522; *Corbett vs. Underwood*, 83 Ill. 324; also cases cited under Ch. III. p. 145.

<sup>2</sup> 66 N. Y. 518.

<sup>3</sup> Ante, p. 354.

<sup>4</sup> The above cases in New York, the case of *Colket vs. Ellis*, 32 Leg. Int. 82, s. c. 10 Phila. (Pa.) 375, and the English case of *Lacey vs. Hill* (*Scrimgeour's Claim*), L. R. 8 Ch.App. 921, would seem to be irreconcilable with the case of *Markham vs. Jaudon*, 41 N. Y. 235.

<sup>5</sup> *Kingsbury vs. Kirwin*, 11 J. & S. (N. Y.) 451; aff'd 77 N. Y. 612.

<sup>6</sup> 32 Leg. Int. (Pa.) 82; s. c. 10 Phila. (Pa.) 375.

stocks. It was shown that there was an established general usage among Brokers, when a "call" loan is not paid on the day it is demanded, to sell out the collateral securities at the Board of Brokers without further notice to the borrower. The trial court found that both parties were familiar with the usage, and both acted throughout on the basis of its validity. The money not having been paid upon call made in the regular way, the defendants sold the stock on the same day at the Stock Exchange, first notifying the plaintiffs of their intention, and rendered the former accounts of the sale. The plaintiffs subsequently tendered the amount of the loan, and demanded the return of the stocks pledged as collateral; and, upon refusal, brought an action of trover to recover for the conversion of the same upon the ground that the usage under which the sale was made was in contravention of the rule of law requiring a sale of collaterals to be public after due notice. But the trial judge, Mitchell, J., overruled this defence, holding, in a well-considered opinion, that where no statute or principle of public policy intervenes but a rule of law, which is a mere privilege, and may be waived, there is no reason why the waiver may not be as well established by a custom known to and acquiesced in by the parties as by an express contract; and, without intimating what would be the effect if such a usage were set up against an outside party, he was of the opinion that, as between the parties before him, both members of the Board of Brokers, and familiar with and dealing on the basis of such usage, it was valid and lawful, and controlled the rights of the parties.

This case confirms the views heretofore expressed under the *fourth* general rule laid down in this chapter,<sup>1</sup> and we confess that we can perceive no legal or substantial reason for not applying the rule as well to third persons who have full

<sup>1</sup> P. 345.

and complete knowledge of the usage as to members of the Stock Exchange—the whole basis of the doctrine of usage resting upon the knowledge of the parties—and why evidence of a similar usage should not have been received in the case of *Markham vs. Jaudon*.<sup>1</sup> In Massachusetts evidence has also been held admissible to show that by the custom of Brokers in Boston, “when they receive an order to buy stocks on margin, it means that the Broker makes a contract, verbal or written, with any person whatever; that within sixty days from said date, if the stock goes up the seller shall pay in cash the difference, and if the stock goes down the buyer shall pay in cash the difference; and that the money, or margin, put up by the buyer is for security that he shall perform his contract.”<sup>2</sup> And it is not error on the part of a judge to instruct a jury that the fact that both parties were Brokers, and might be presumed to know the usages of their business, was entitled to great weight.<sup>3</sup>

(b.) *In England.*

But by far the greatest number of decisions in which the usages of Brokers have been sustained are to be found in England. In that country the question of the effect of usage upon contracts has been carefully and thoroughly considered by the courts.

There are two classes of cases in which the usages of Stock-brokers have been sustained which have already been referred to at length, and they need not be here set forth.<sup>4</sup> The first class comprises those cases in which a principal or Client directed his Broker to buy or sell securities or to make contracts upon the Stock Exchange; and where the Broker has

<sup>1</sup> 41 N. Y. 245; see also, in this connection, *Lacey vs. Hill* (Scrimgeour's Claim), L. R. 8 Ch. App. 921. Mass. L. R. (May 4, 1881) No. 24; s. c. Am. L. Rev. 360 (May, 1881).

<sup>3</sup> *Durant vs. Burt*, 98 Mass. 162.

<sup>2</sup> *Commonwealth vs. Cooper*, 4

<sup>4</sup> See Ch. V.



sought indemnity at the hands of his Client for acts performed by him in pursuance of directions of his Client. The principle applied was, that parties who make or direct a bargain or transaction to be made in connection with a particular trade are taken to have contracted subject, or with reference, to the known usages of that trade. *Sutton vs. Tatham* and *Pollock vs. Stables*<sup>1</sup> are illustrations of this class, as are the other cases cited under the *fifth* general rule.<sup>2</sup> As the most important of these cases have been set forth in Chapter III.,<sup>3</sup> a reference to them is all that is necessary in this connection.

The second class comprises those cases in which the principal question involved was upon whom the liability for "calls" rested where stocks were sold on the Stock Exchange. In these cases the courts fully investigated the various steps of a purchase and sale upon the Stock Exchange, and rigorously and uniformly applied the usages and rules of Stock-brokers to explain the contracts there entered into, and to fix the ultimate responsibility for "calls" made where the capital stock was not fully paid up to the limit fixed by the charter or articles of incorporation. As these cases have been fully described in Chapter V., it is only necessary, in this connection, to refer to that portion of the work;<sup>4</sup> but their perusal will forcibly illustrate the extent to which the English courts have gone in applying this doctrine of usage. In considering the soundness of the cases in which usage has been rejected, these English adjudications should be prominently kept in view.

There are a few cases in England that do not fall within either of these classes, and to them a more special reference should be made. Thus,<sup>5</sup> it has been decided that evidence of

<sup>1</sup> Ante, p. 351.

<sup>2</sup> P. 351 et seq.

<sup>3</sup> At p. 268 et seq.

<sup>4</sup> P. 123.

<sup>5</sup> *Adams vs. Peters*, 2 C. & K. 723.

the course of business and custom of London Brokers should be admitted to explain the authority meant to be given to a London banker by a power of attorney to sell stock sent through a country banker.

So in an action for the non-acceptance of railway shares, which by the contract (made at Liverpool through Brokers) were to be delivered in a reasonable time, a written rule of the Liverpool Stock Exchange, stated to be acted upon by all the Liverpool Brokers, "that the seller of shares was in all cases entitled to seven days to complete his contract by delivery, the time to be computed from the day on which he was acquainted with the name of his transferee," was held admissible upon an issue whether the plaintiff, within a reasonable time, was ready and willing and offered to transfer the shares; although it was not proved that either of the parties or their Brokers were members of the Liverpool Exchange.<sup>1</sup> And, in avoidance of a sale made by a Broker, the defendant may prove that by the custom of the trade the authority to sell expires with the day on which it was given.<sup>2</sup>

It has also been held that parol evidence is competent to show that a person acted as a Broker for the plaintiff; and that parol evidence as to the usage of trade in making Brokers liable where their principals are not disclosed is also admissible, on the ground that such evidence does not vary the terms of a written contract, but merely annexes a particular or incident thereto which, though not mentioned in the contract, was connected with it, or with the relations growing out of it. Such evidence is admitted with a view of giving effect, as far as possible, to the presumed intentions of the parties.<sup>3</sup>

<sup>1</sup> Stewart vs. Cauty, 8 M. & W. 309. <sup>3</sup> Humfrey vs. Dale, 7 El. & Bl. 266;  
Also Field vs. Lelean, 6 H. & N. 617. Thomson vs. Davenport, 9 B. & C.  
<sup>2</sup> Dickenson vs. Tilwall, 1 Stark. 78; Pennell vs. Alexander, 3 El. &  
128; 4 Campb. 279. Bl. 77, 288.

*III. Cases in which Usages have been Rejected.**(a.) In the United States.*

There are in the United States a number of cases arising out of transactions in stocks in which the usages of Brokers have been rejected. A close examination of these decisions, however, shows that in many instances they are utterly irreconcilable with the rules which we have laid down, as well as with the theory upon which usage is admitted in evidence.

Beginning with the cases in the State of New York, we find the well-known case of *Allen vs. Dykers*.<sup>1</sup> In that case it appeared that A. borrowed of D., a Stock-broker, a certain sum of money, for which he placed in his hands as collateral security certain bank stock, at the same time giving to the Broker a promissory note agreeing to pay the loan at a time stated, and, in default, empowering the Broker to sell the same at the Board of Brokers. The Broker immediately transferred the stock into his own name, and, before the maturity of the note, pledged or parted with the same.

In defence of an action against the Broker, brought to recover the difference between the value of the stock and the money loaned, he offered to prove that, when Brokers took assignments of stocks as collateral security for the money loaned, it was not the custom to retain the stocks in specie, but to transfer it by hypothecation or otherwise, if they thought proper; and, on payment or tender of the principal debt, to return to the debtor an equal quantity of the same kind of stock, and that this custom was known to the plaintiff when the transaction was made. The court held that this evidence was illegal and properly ruled out. The Brokers proved that from the date of the note until after it fell due they had a

<sup>1</sup> 3 Hill, 593; *aff'd* 7 id. 497.

larger quantity of stock than that mentioned in the note ; but it appeared that all of this stock, except seventy-two shares, stood in the names of persons to whom it had been pledged as collateral security for various loans made to defendants, the Brokers. The court said : "The defendants being Stock-brokers and dealers in stock, their counsel offered to prove on the trial that it was the usage, when stock was transferred to such dealers by way of collateral security, not to hold it specifically, but to transfer it by hypothecation or otherwise, at pleasure, and, on payment or tender of the money advanced, to return an equal quantity of the same kind of stock ; also that this usage was general, and known to the agent who made the loan in question. The object of the offer was to lay the foundation for insisting that the usage should be regarded as incorporated in and forming part and parcel of the agreement, thus making the latter import a consent on the part of the plaintiff that the defendants might use the stock during the running of the loan, the same as if they were the absolute owners. *It is not necessary to determine what effect would be due to such proof in the case of a simple pledge, as collateral security without any further agreement.* Possibly the known usage in like cases might be considered as attaching itself to the transaction, and constituting a part of it. But where the parties have chosen to prescribe for themselves the terms and conditions of the loan, they must be held to abide by them, and we are especially bound to refuse effect to any general or particular usage when in direct contravention of the fair and legal import of a written contract."

The ground upon which the court rested its judgment in this case—viz., that the usage in question conflicted with the terms of the contract—is perfectly sound. But did the usage conflict with the written contract ? There was nothing said in the contract as to what disposition might be made of the

stock during the pendency of the loan; but the argument of the learned judge delivering the opinion was that it was to be inferred, from the language contained in it, that no disposition could be made of the same by the pledgee, upon the maxim *Expressio unius est exclusio alterius*. With the utmost deference for the opinions of Chief-justice Nelson, it seems to us that, in the absence of express provision to the contrary, the usage mentioned should have been held operative. The knowledge of the usage made it a part of the contract, and there is no room for the application of the maxim. The court sought to distinguish the case from *Nourse vs. Prime*,<sup>1</sup> on the ground that in the latter case the Stock-brokers proved that they had always on hand a number of shares equal to the amount pledged with them, whereas in the present case there was no such proof. It is very difficult, however, when the facts of both cases are carefully analyzed, to reconcile them; for it did appear in *Allen vs. Dykers* that the Brokers were, during the existence of the pledge, the owners of more than the number of shares pledged with them. The fact that the Stock-brokers had pledged, for the purposes of their business, nearly all of the particular stock held by them does not affect the question, because the Brokers could have repossessed themselves of it by paying off the loan.

The doctrine of *Allen vs. Dykers* does not seem to have been very heartily accepted by the Court of Appeals in the subsequent case of *Horton vs. Morgan*;<sup>2</sup> for although it was quoted by counsel in the argument,<sup>3</sup> it was not mentioned in the opinion; and the court seem to have regarded the question, which was apparently settled in *Allen vs. Dykers*, as still open, by saying, "It is unnecessary to pass upon the ruling by which evidence was admitted to show the custom of Brokers

<sup>1</sup> 4 Johns. Ch. 490; 7 id. 69.

<sup>2</sup> 19 N. Y. 170.

<sup>3</sup> See Brief of Counsel, N. Y. Ct. of App. Dec., on file in N. Y. Law Inst.

to sell and hypothecate stock held by them as security on advances, and we do not give any judgment upon that question." Yet the case has never been directly overruled.

It seems to us that there can be no substantial reason to charge a pledgee with a conversion of securities for parting with or repledging the same, where he can establish that the usages of Stock-brokers, and the peculiar nature of their business, known to the pledgor, permits and makes such a practice necessary; and where, upon the expiration of the loan, or upon demand, as the case may be, the pledgee is ready to deliver to the pledgor shares of the identical character deposited with him.<sup>1</sup>

The next case which we shall notice is the familiar one of *Markham vs. Jaudon*.<sup>2</sup> We have already criticised this case in this chapter in connection with the question of usage,<sup>3</sup> and it is unnecessary to devote much space to it here. In that case, the defendants, in answer to an action for the conversion of certain stocks which they were "carrying" for the plaintiff on margin, offered to prove the existence of a custom in the city of New York between Brokers and their Clients by which Brokers have the right to sell out the Clients' stocks on the exhaustion of the margin. The court, in commenting upon such evidence, said: "This was an offer not to explain the meaning of particular terms, or to prove attending circumstances to enable the court to construe the agreement, but to

<sup>1</sup> See, as sustaining these views, *Horton vs. Morgan*, 19 N. Y. 170; *Lawrence vs. Maxwell*, 53 id. 19; see also Ch. III. p. 145. On the other hand, as sustaining *Allen vs. Dykers*, see *Taylor vs. Ketchum*, 35 How. (N. Y.) Pr. 289; also *Currie vs. Smith*, 4 N. Y. Leg. Obs. 343; *Wheeler vs. Newbould*, 16 N. Y. 393, where the court held that evidence was inadmissible of a local usage in the city of New York to sell commercial pa-

per pledged as security for a loan, at private sale, and for the best price that could be obtained, after demand of payment and notice that such sale would be made in case of default. The court said that such a custom, if it existed, would be illegal and void.

<sup>2</sup> 41 N. Y. 245. For history of this case, see Ch. III. p. 112, and ch. on "Measure of Damages."

<sup>3</sup> Ante, p. 346.

change the rights of the parties to a contract. By the law, as I have interpreted it, the customer did not lose the title to his stock by any process less than a sale upon reasonable notice, or by judicial proceedings. The Broker had no right to sell without such a notice. A practice or custom to do otherwise would have no more force than a custom to protest notes on the first day of grace, or a custom of *Brokers not to purchase* the shares at all, in a case like the present, but to content themselves with a memorandum or entry in their books of the contract made with their customer. Such practice, in each case, would be in hostility to the terms of the contract, an attempt to change its obligations, and would be void. The proof could not therefore be legally given."

The objections to the conclusions reached in this case, as above set forth, may be thus summarized.

I. There is no doubt but that the "notice" alluded to could have been waived by express agreement.<sup>1</sup> A knowledge of the existence of a usage to sell without notice would have the same effect, and should be regarded as incorporated in the contract.<sup>2</sup>

II. Under the circumstances disclosed, this usage was a perfectly reasonable one, and it is erroneous to consider the case as if it were one of pure bailment arising between pledgor and pledgee.

III. The question has been settled differently in England.<sup>3</sup>

There are but two other cases in the State of New York upon this question of usage, to which we deem it necessary to call special attention—viz., *Spear vs. Hart*,<sup>4</sup> and *Lombardo vs. Case*.<sup>5</sup> In *Spear vs. Hart*, the court held, in accordance with

<sup>1</sup> *Baker vs. Drake*, 66 N. Y. 518.

<sup>2</sup> See also ante, p. 352.

<sup>3</sup> *Lacey vs. Hill* (Serimgeour's Claim), L. R. 8 Ch. App. 921, and practically in Pennsylvania. Col-

ket vs. Ellis, 32 Leg. Int. 82; s. c. 10 Phila. (Pa.) 375; see also *Corbett vs. Underwood*, 83 Ill. 324.

<sup>4</sup> 3 Rob. 420.

<sup>5</sup> 30 How. (N. Y.) Pr. 117.

the general rule upon the subject, that on a sale of stock deliverable at a future day at the option of the seller, a dividend declared before the sale, but not payable until after the day fixed for the delivery of the stock, belongs to the seller, and does not pass to the buyer under the contract. The effect of this rule was sought to be changed by the introduction of a usage of Wall Street. This evidence was ruled out.

The defendant had agreed to deliver certain railway stock, seller's option, in ten days from March 28, 1865. This matured on the 7th of April. On the 23d of March the railroad company declared a dividend of five per cent., payable on the 10th of April, and closed their transfer-books on the 31st of March. The court, through Monell, J., said: "I do not think such a custom could alter well-settled principles applicable to the law of contracts. . . . But under a contract to sell 100 shares of stock, a custom that something more passes to the purchaser cannot be allowed. It varies the agreement by adding to it, and it would not be merely an explanation or interpretation of it."

The facts of this case are very meagrely reported, and it does not appear whether the sale was made on the Stock Exchange. The invariable rule or usage of Stock-brokers is to sell stock with the "dividend on," until the books are closed, after which event the stock sells "ex dividend."<sup>1</sup>

Under ordinary circumstances, therefore, the purchaser in the above case would have been entitled to all dividends on the stock at the time of the closing of the books on the 31st of March, the sale having been made before that time, that fact actually entering into and affecting the market price of the stock. And, according to the views which we have already expressed, such a usage is perfectly valid, because it becomes a part of the contract of the parties. Persons entering into agreements through Brokers understand that sales of stock made

<sup>1</sup> See Art. XVI., By-laws N. Y. Stock Exchange.



at the Board of Brokers at any time before the day fixed for the closing of the transfer-books of the company, declaring a dividend payable at a future day, carry with them the dividend so declared, and the price is regulated accordingly. After the books are closed, the sales are understood to be "ex dividend," and the price is accordingly affected by the fact that the seller retains and is to collect the dividend.<sup>1</sup>

So, in *Lombardo vs. Case*, the contract made by a Stock-broker was as follows: "New York, October 8, 1863. For value received, the bearer may call on me for one thousand shares of the stock of the Cleveland and Pittsburgh Railroad Company, at one hundred and seventeen (117) per cent., any time in six months from date, without interest. The bearer is entitled to all dividends declared during the time to half-past one P.M. each day." It was held, on demurrer to the complaint for a dividend declared prior to the making of the contract, that an alleged custom among Brokers and dealers in stocks, that the words "dividends or surplus dividends" in the contract were intended to mean dividends declared on the stock without regard to whether they had been announced *before or after the date of the contract, provided* that on the day the contract was made the stock was selling in the market "*dividend on*," and not "ex dividend," would not be allowed to be proved on the trial, for the reason that effect could not be given to the custom without making a new contract between the parties, as six months from date could not mean or include "a day or two before date." Consequently, a dividend of four per cent., which had been declared and announced at the time of the making of the contract, could not be recovered by the purchaser, although the stock was then selling "*dividend on*."<sup>2</sup>

<sup>1</sup> These usages were recognized in the case of *Hill vs. Newichawanick Co.* 8 Hun (N. Y.), 459, *aff'd* 71 N. Y. 593. But see *Jones vs. R. Co.* 57 N. Y. 196.

<sup>2</sup> *Lombardo vs. Case*, 30 How. (N. Y.) Pr. 117; *Hopper vs. Sage*, 12 N. Y. *Weekly Dig.* 78.

In *Harris vs. Tumbridge*,<sup>1</sup> it was held proper to exclude proof that it was common for parties purchasing "straddles" to operate in stocks, holding the straddle as security; but no custom or usage such as to modify the contract, or become interwoven with its terms, was in any manner shown in that case. The court said that "a custom or usage which binds the parties to a contract does so only upon the principle either that they have knowledge of its existence, or that it is so general that they must be supposed to have contracted with reference to it."

In closing this criticism of the New York cases, in which the usages of Stock-brokers have been rejected, we are compelled to say that they are far from being satisfactory.

The usages of Brokers, bankers, and others cannot be set up to defeat the well-settled and universally applied principle of the commercial law that the purchaser of negotiable paper past due takes it subject to the equities of other parties, and can acquire no better title than his transferror.<sup>2</sup> In the last-cited case a number of United States Treasury notes had been stolen from an express company and purchased by a firm of bankers, after the date at which they were payable or convertible into bonds. Evidence was introduced to show that securities of the kind in question continued to be bought and sold by bankers and Brokers after they had become due. The court held that this fact did not avail to alter the law. "Bankers, Brokers, and others," said the court, "cannot, as was attempted in this case, establish by proof a usage or custom, in dealing in such paper, which in their own interest contravenes the established commercial law. If they have been in the habit of disregarding that law, this does not relieve them from the consequences, nor establish a different law."

<sup>1</sup> 83 N. Y. 92.

<sup>2</sup> *Vermilye vs. Adams Exp. Co.* 21 Wall. 139.

A close examination of this case will show, however, that the evidence offered did not amount to a proof of a general usage of Bankers and Brokers to deal in negotiable paper after it was due, and to treat it as not due, and the case should be confined to the peculiar facts there stated. Moreover, there seems to be an insuperable objection to such a usage, as it would operate to defeat the rights of third persons not parties to it. Usage is only admissible as forming a part of a contract. In the case in question the dispute was between adverse claimants for the possession of certain personal property, the Treasury notes, and it is not very clear how such a usage as that invoked could avail in such a controversy.

In Pennsylvania there seems to be but one adjudication in which the usage of Brokers was rejected. The subject was considered in the case of *Evans vs. Waln*,<sup>1</sup> by the Supreme Court of that state. There the plaintiffs employed M. & Bro., Brokers, in Philadelphia, to sell certain stock for them. M. & Bro. in turn employed one W., another Broker in Philadelphia, to sell the stock, and the sale was eventually made through the defendants, Stock-brokers in New York. W. being in debt to the defendants, and becoming insolvent, the latter deducted the amount of such indebtedness from the proceeds of the sale of plaintiffs' stock, and remitted the balance. In an action by the plaintiffs to recover the full purchase-money, it was shown that the defendants knew that the stock belonged to the plaintiffs, and that W. was acting as Stock-broker for them. The defendants offered to prove a custom by which Brokers kept transactions with one party all in one account, and remit the balance. This was ruled out. The appellate court held that the ruling was correct, and that such a custom, if proved, would have constituted no defence, as the defendants had no right to credit W.'s account with

<sup>1</sup> 71 Pa. St. 69.

the proceeds of the stock: he was not the owner of it, and had no title or claim to its proceeds; the defendants had not received the stock from W., and they were not bound to account to him for the price at which it was sold.

As it was not shown that the account of W. was credited with the proceeds, the court held that it was clear the case was not within the operation of the custom, if any such existed. The court, in conclusion, based its reason for rejecting such evidence upon the following ground: "If there is a custom among Stock-brokers, when dealing with others, to appropriate money belonging to the principal to the payment of his Broker's indebtedness, the sooner it is abolished the better—*Malus usus est abolendus*. A custom so iniquitous can never obtain the force or sanction of law, and the marvel is that it should be set up as a defence in this action." It will be observed that not even the express agreement of W. could have produced the result claimed for by defendants.<sup>1</sup>

Massachusetts furnishes several instances where the usages of Brokers have been rejected. In *Parsons vs. Martin*,<sup>2</sup> which appears to be the earliest reported case in that state upon the subject, it was held that a Broker to whom a certificate of shares in a corporation were intrusted by their owner, with written directions to sell under circumstances specified, had no right to transfer the shares for any other purpose, to the name of another person or his own name, and that evidence was inadmissible of a custom among Brokers so to do; and the owner may treat such transfer as a sale, and recover of the Broker the market price of the shares on the day of the transfer, although the Broker afterwards tenders him another cer-

<sup>1</sup> To same effect, *Fisher vs. Brown*, 104 Mass. 259; *Pearson vs. Scott*, 38 L. T. (n. s.) 747; see also *Sweeting vs. Pearce*, 7 C. B. (n. s.) 449; and no usage will authorize a factor or agent to depart from positive instructions (*Barksdale vs. Brown*, 1 Nott. & M. (S. C.) 517).  
<sup>2</sup> 77 Mass. 111.

tificate of an equal number of such shares, which he refuses to receive and does not retransfer to the Broker.

The court further held that a custom among Stock-brokers in Boston, permitting a Broker to make a sale of stock, not on account of plaintiff, but for some other person, using plaintiff's shares for that purpose, and replacing them with other shares of a like kind, was bad. No usage or custom such as that which defendant attempted to show could affect the legal rights of the parties; nor, if fully proved, would the law sustain or tolerate it. Proof of usage is admissible to interpret the meaning of the language of the contract, or, where its meaning is equivocal and obscure, to ascertain its nature and extent, but not to vary its terms or introduce new conditions, or authorize *the doing of acts which are in direct contravention of its provisions*.

"From these considerations," said the court, "it is obvious, and, indeed, it seems to be a necessary consequence from them, that the general proposition stated by the court, 'that if the defendant caused the shares of stock belonging to the plaintiff to be transferred to himself, in such a way and under such circumstances that they were not afterwards to be traced or distinguished from other shares held by the defendant, such a transfer, if made without the plaintiff's authority, could not be justified by any usage to that effect among Brokers,' was correct. And, having thus violated his duty by making a disposition of the stock which was unauthorized and unjustifiable, he became immediately responsible for the value of the property with which he had been intrusted. It was, in effect, a conversion of it to his own use. It is no defence to a claim arising under an unlawful conversion of property by such an unauthorized proceeding as this, that the defendant was, at all times afterwards, either actually possessed of, or had the means of immediately obtaining, other shares of stock in the same

company of equal value with those disposed of, which he was ready and intended, whenever called upon, to substitute for those belonging to the plaintiff which he had disposed of. The misappropriation had already taken place, the wrong had been done, and the right to an adequate remedy had already accrued. The shares which the plaintiff had owned could no longer be identified, and there was no pretence, therefore, that they could ever be restored to him. He was not bound to take others in their stead, but was entitled to recompense for those which had been unlawfully taken from him."

We have set out thus fully the views of the court in this case because, although the general result reached in the case may be correct, this reasoning directly conflicts with the New York cases, in which it is held that a Broker purchasing shares on margin, or speculatively, is not bound to keep on hand the identical stock purchased, but that he fulfils his duty to his Client by having ready to deliver, upon demand, similar shares of stock—there being no difference between them, one share being equal in value to the other.<sup>1</sup>

In *Pickering vs. Demeritt*,<sup>2</sup> the court intimated that it would be very difficult to support a usage by which a Broker employed to purchase stock might, without the knowledge of his principal, buy the stock of himself. In another case<sup>3</sup> it was held that a certificate of stock expressing on its face to be "transferable only on the books of the company by the holder thereof in person, or by a conveyance in writing recorded on said books, and surrender of this certificate," and transferred in blank upon its back, is not a negotiable instrument. The certificate was in the name of "E. Carter, Trustee." In this case it was attempted to be shown that it was usual with

<sup>1</sup> See this subject discussed in Ch. III. p. 145.

<sup>2</sup> 100 Mass. 416.

<sup>3</sup> *Shaw vs. Spencer*, 100 Mass. 382; cited and approved in *Fisher vs. Brown*, 104 id. 261.

dealers in the Stock Market to deliver, by way of sale or pledge, certificates of stock with a blank transfer upon the back; that it is usual for holders of certificates of stock transferred in blank to fill them up by inserting the name of some person as transferee or purchaser; that it is a matter of common occurrence for certificates of stock to be issued in the name of some other person as trustee; that certificates of stock issued to a designated person as trustee are constantly bought and sold in the Stock Market by a simple endorsement of the certificate by the person named as the holder, without inquiry as to the authority by which, or to the use or purpose for which, the transfer was made. But the judge, at the trial, ruled that the propositions were immaterial and inadmissible, and the ruling was sustained on appeal.<sup>1</sup> The court said: "A usage to disregard one's legal duty, to be ignorant of a rule of law, and to act as if it did not exist, can have no standing in the courts."

Again, it was held in the same state\* that the order of a Client to a Broker to buy stock deliverable at any time, at buyer's option, in sixty days does not authorize the Broker to buy the stock himself at thirty days, and deliver it to his customer at the end of sixty days at an increased price and interest, besides the usual commissions, and that a usage of Brokers so to do is bad; and that an exchange of bought and sold notes between the Broker and the Client, and the giving of his note by the latter in payment for the stock, in ignorance of the Broker's conduct, was not a ratification of his acts.

The court said: "The usage alleged by the plaintiffs to exist among Stock-brokers in Boston cannot avail them. There

<sup>1</sup> An offer to prove a similar custom was ruled out in Pennsylvania in the case of *Aull vs. Colket*, 2 W. N. C. 322; 33 Leg. Int. 44; compare with these authorities the English case of *Goodwin vs. Robarts*, L. R. 10 Ex. 76, where it is held that negotiability may be established by usage.

<sup>2</sup> *Day vs. Holmes*, 103 Mass. 306.

are many forcible objections to its validity; but a conclusive one is, that it is against *sound policy and good morals*. It authorizes the Broker, in his discretion, to disregard his instructions, and, instead of acting solely in the interests of his principal, to speculate upon the transaction for his own benefit. It creates in an agent an interest adverse to his principal, and is inconsistent with his duty and the obligations which the law imposes upon him when he enters into the contract of agency. Such a usage, *unknown to the principal*, cannot be supported." The court cited the earlier case of *Pickering vs. Demeritt*.<sup>1</sup> While the *result* reached in this case may be correct,<sup>2</sup> the ground upon which it is put does not seem to be tenable, for the court intimates that if the usage had been known to the principal it might have been supported; yet the ground of its rejection is, that it is against sound policy and good morals. If the usage be against public policy, or *contra bonos mores*, the courts would reject it, whether known to the principal or not, just as they would reject an express agreement under the same circumstances. The result of such a usage would be to convert a Broker into a principal, and to make him a seller instead of an intermediary. And if parties agree, and all the circumstances are fair and free from fraud, there would seem to be no element of morals or public policy to prevent such a transaction. Agents or Brokers may deal directly with their principals the same as third persons, and it is only where the Broker acts in a dual character that the law is shocked and his transactions vitiated.

So a custom of Stock-brokers, when they receive an order from a Client to purchase securities, to assume it themselves, instead of making contracts with third persons, is inadmissible.<sup>3</sup>

<sup>1</sup> 100 Mass. 416.

<sup>2</sup> It is fully sustained in *Robinson vs. Mollett*, *infra*, p. 380.

<sup>3</sup> *Commonwealth vs. Cooper*, 4 Mass. L. R. (May 4, 1881) No. 24; s. c. 15 Am. Law Rev. 360 (May, 1881).



In the case of *Oelricks vs. Ford*,<sup>1</sup> it was held that where there was a written contract for the delivery of a certain number of barrels of flour, at a given price, to be delivered within a named time, at the seller's option, and evidence was offered by the purchaser of a usage existing that a margin should be put up, the court below was right in refusing to allow this evidence to go to the jury, because it was too indefinite and uncertain to establish a usage.

*(b.) In England.*

In England, as we have seen, the courts have been more liberal in sustaining the usages of Stock-brokers; yet there are a number of cases where such usages were rejected. A few of the leading adjudications are given in this connection.

In the case of *Pearson vs. Scott*,<sup>2</sup> the plaintiffs, as executors, instructed S., a solicitor, to have some stock and shares sold, and authorized him to receive the proceeds of such sale. S. employed in the business the defendant, a Stock-broker, with whom he had at the time a current account for differences, upon private speculative transactions on the Stock Exchange. The defendant, having sold the property, paid a portion of the proceeds to S., and by his directions placed the balance to the credit of S. in the current account. S. never paid the balance to the plaintiffs, but subsequently absconded, and was declared a bankrupt. The court found that the defendant had notice of the agency of S. in the business, and it was held that the defendant was liable for the balance; and that a usage of the London Stock Exchange to the contrary would be unreasonable, and could not be upheld in the absence of knowledge of it on the part of the principal.<sup>3</sup>

<sup>1</sup> 23 How. (U. S.) 49.

<sup>2</sup> 38 L. T. (n. s.) 747.

<sup>3</sup> To same effect are the American

cases of *Fisher vs. Brown*, 104 Mass. 259; *Evans vs. Waln*, 71 Pa. St.

469.

In the case of *Duncan vs. Hill*,<sup>1</sup> the plaintiffs, Brokers on the London Stock Exchange, bought for the defendant (who was not a member of the Stock Exchange) certain shares for the account of the 15th of July, 1870, and on that day, by his instruction, carried them over to the account of the 29th of July, and paid differences amounting to £1688. The defendant, and various others, principals of the plaintiff, not having paid the amount due from them in respect of contracts for the 15th of July, the plaintiffs became defaulters; and on the 18th, in conformity with the rules of the Stock Exchange, they were so declared, and their transactions were closed, and accounts were made up at the prices current on that day. On the closing of the accounts, a further sum became due from them in respect of differences upon the contracts carried over by them for the defendant. In an action to recover this sum and the £1688, held (reversing the decision of the court below) that the defendant was not liable for anything beyond the £1688, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into the contracts, which he was authorized to enter into by the principal, but by reason of his own insolvency; although the transaction had been carried out in accordance with the customs and rules of the Stock Exchange, which, however, were not proven to have been known to the defendant. The court, through Mr. Justice Blackburn, upon the subject of usage, said: "It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts, according to such rules, unless they be wholly unreasonable, and where the default is without any personal fault of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect. But it is argued that where the agent, as in this case,

<sup>1</sup> L. R. 8 Ex. 242.

is subjected to loss, not by reason of his having entered into the contracts into which he was authorized to enter by his principal, but by reason of a default of his own—that is to say, as in this case, by reason of his insolvency, brought on by want of means to meet his other primary obligations—it cannot be said that he has suffered loss by reason of his having entered into the contracts made by him on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him, and in the present case there certainly was no express promise to this effect. . . . The plaintiffs' insolvency was, so far as regards the defendant, entirely the result of their own default."

In *Tompkins vs. Saffery*,<sup>1</sup> it appeared that C. was a member of the Stock Exchange; he notified the secretary that he was unable to meet his engagements on the Exchange. In such a case the rules of the Exchange prescribe the course to be followed: the defaulter ceases to be a member of the body; two members of the Exchange act as official assignees of the defaulter; a meeting of the creditors is called; the defaulter (as he is required to do) makes his statement; and, the assembled creditors having decided what is to be done, the official assignees carry the decision into execution. C. made his statement that he had no debts outside of the Exchange. The creditors of C., members of the Stock Exchange, then consented to accept a composition; and, to provide for a part of it, he, at the demand of the official assignees, gave them a check for £5000, then standing to his credit in the Bank of England. It afterwards appeared that C. owed debts to a number of outside creditors and was declared a bankrupt. The trustee in bankruptcy, on behalf of these creditors, claimed this sum from the official assignee of the Stock Exchange, and the court decided that the trustee was entitled to claim it, for

<sup>1</sup> L. R. 3 App. Cas. 213.

the action of C. in paying it to the official assignees amounted to a *cessio bonorum*, and constituted an act of bankruptcy; and that the rules of the Stock Exchange as to defaulting members of the body are the rules of a domestic forum, which have no influence on the rights of those who are not amenable to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member.<sup>1</sup>

But the case in which the extent of usages in controlling contracts was most thoroughly considered was that of *Robinson vs. Mollett*,<sup>2</sup> which we have before referred to. There R., a merchant of Liverpool, gave orders to a tallow-broker in London to buy certain quantities of tallow for him. The Broker did not buy the specified quantity from any person, though he sent bought notes in the usual form—"Bought of A. on your account;" but both before and after the order he bought from various persons, in his own name, larger quantities of tallow, proposing to allot to R. the quantities R. had desired to be bought. On R.'s refusal to accept, the Broker sold the tallow, and brought an action for the differences. Held, that though the evidence showed such a mode of dealing to be the usage in the London tallow market, the action was not maintainable against a principal who did not appear to have had knowledge of its existence. A custom in a particular market, that a Broker who has purchased and is purchasing goods of a particular kind, in his own name, may take portions of those goods and supply them to principals who have employed him in his character of Broker to buy such goods for them, is one of a peculiar nature, and cannot be sup-

<sup>1</sup> See also *Ex parte Neilson*, 3 De G. M. & W. 560, note, where Skirrow, 802. See also *Johnston vs. Usborne*, Com., said: "The rules of the Stock Exchange are inoperative that interfere with the law of the land."

<sup>2</sup> L. R. 7 H. L. Eng. & I. App. Cas. 11 A. & E. 549.

ported as against a principal not proved to have been acquainted with it when he gave the order.<sup>1</sup>

In conclusion, we think that an examination of the American cases will show that the effect of the usages of Stock-brokers upon contracts made on the Exchange have not been sufficiently considered or applied.

The system of business transacted between Stock-brokers and their Clients is so novel when contrasted with the ordinary relation of principal and agent, the business is generally despatched with such marvellous promptness, and its results very often involve sums of such great magnitude, that, in a contest where either the Broker or the Client seeks to be relieved from the responsibilities of his position, the usages of the Exchange, when fully proved, should play an important part, especially in the absence of an express agreement; and even if these usages seem at times to intrench upon abstract principles of law, it should be remembered that the business of dealing in shares upon speculation is a new one, full of legal anomalies, and that it should not be too strongly governed by rules that were made for a different and simpler condition of business in times long since passed.

<sup>1</sup> See also *Langton vs. Waite*, L. R. 6 Eq. 165.

## CHAPTER VIII.

### STOCK-JOBGING.

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#### *I. Dealings in Stocks at Common-law.*

#### *II. Stock-jobbing Acts.*

(a.) *In England.*

(b.) *In the United States.*

#### *III. Wagers.*

(a.) *At Common-law.*

(b.) *Under Existing Laws.*

(c.) *Wagers between Principals.*

(d.) *Actions by Brokers for Money Laid Out, etc., and Commissions in Stock Transactions.*

(e.) *Options, "Puts," "Calls," "Straddles."*

(f.) *Conspiracy to Affect Stocks, etc.—"Corners," "Pools."*

(g.) *General Principles Deducible from the Cases.*

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#### *I. Dealings in Stocks at Common-law.*

AT common-law there is nothing illegal in the sale of the shares or scrip of a corporation.<sup>1</sup> They are treated the same

<sup>1</sup> *Barklay's Case*, 26 Beav. 177; named companies was prohibited until the company had obtained a certificate of complete registration. *Aston's Case*, 4 De G. & J. 320; *Harrison vs. Heathorn*, 6 Man. & G. 81; *Tempest vs. Kilner*, 2 C. B. 300, 308; Even then sales made by any subscriber not registered as a shareholder were made illegal, § 26; see also *Ex parte Neilson*, 3 De G. M. & G. 556; *Morris vs. Cannan*, 4 De G. F. & J. 582. This statute was repealed, *Bagge's Case*, 13 Beav. 162; *Noyes vs. Spaulding*, 27 Vt. 429; *Chitty on Cont.* (11th ed.) 1011, 1012, note (d). But in England, by statute 7 & 8 Vict. c. 110, the sale of shares of certain

as any other kind of property, and are subject to no restrictions or limitations except such as are imposed from time to time by acts of the legislature, as will be hereafter noticed.

## *II. Stock-jobbing Acts.*

Early in the reign of George the Second, the speculation in public stocks or securities became so prevalent, and assumed so many different forms of gambling, that the whole business community became infected and demoralized by it. Accordingly, in 1734, a statute was enacted,<sup>1</sup> which by a subsequent statute in 1737<sup>2</sup> was made perpetual, entitled "An Act to Prevent the Infamous Practice of Stock-jobbing." This statute will hereafter be stated in full. It was enacted for the purpose of preventing gambling in the funds, by parties who never intended to buy or sell, but merely to speculate upon the future price of stock, by making what are called "time bargains," and compounding for differences. It was never intended to affect the *bona fide* sale of stock, where the stock was actually transferred, although the seller was not possessed of it at the time of making the contract.<sup>3</sup>

and the prohibitions never extended to companies the formation of which was commenced before the 1st of November, 1844 (in reference to which see *Baker vs. Plaskitt*, 5 C. B. 262; *Aston's Case*, 27 Beav. 474), nor to railway or other companies requiring the authority of Parliament (*Young vs. Smith*, 15 M. & W. 121; *Bousfield vs. Wilson*, 16 id. 185; *Lawton vs. Hickman*, 9 Q. B. 563).

It has also been held that if a company, or a prospected company, is itself illegal, the sale of its shares or scrip is also illegal (*Joseph vs. Pebrer*, 3 B. & C. 639; *Buck vs. Buck*, 1 Campb. 547). But there is nothing illegal in the sale of shares in companies which are being wound up. *Rudge vs. Bowman*, L. R. 3 Q. B. 689.

By the statute of 14 Geo. III. c. 48, no insurance shall be made on the life of any person, or on any other event wherein the person for whose use or benefit, or on whose account, such policy shall be made shall have an interest by way of gaming or wagering. Under this enactment it was decided, in *Paterson vs. Powell* (2 Moo. & S. 399; 9 Bing. 320) that an engagement, in consideration of forty guineas, to pay one hundred pounds in case Brazilian should be at a certain price on a certain day, subscribed by several persons each for himself, is a void wagering policy.

<sup>1</sup> 7 Geo. II. c. 8.

<sup>2</sup> 10 Geo. II. c. 8.

<sup>3</sup> Addison on Cont. (2d Am. ed.)

This act was called "Sir John Barnard's Act," after the name of the individual who was instrumental in procuring its passage. The preamble, which briefly summarizes the effects of stock-jobbing, was as follows: "Whereas, great inconveniences have arisen, and do daily arise, by the wicked, pernicious, and destructive practice of stock-jobbing, whereby many of his Majesty's good subjects have been and are diverted from pursuing and exercising their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce." The statute then enacts that all contracts and agreements upon which any premium shall be given or paid for liberty to put upon, or deliver, receive, accept or refuse any public or joint-stock or other public securities whatsoever, or any part, share, or interest therein, and also all wagers and contracts in the nature of wagers, and all contracts in the nature of puts and refusals, relating to the then present or future price or value of any such stocks or securities as aforesaid, shall be void; and all premiums or sums of money given, received, paid, or delivered upon any such contracts or agreements, or upon any such wagers, or contracts in the nature of wagers, shall be restored or repaid to the person who shall give, pay, or deliver the same, who shall be at liberty, within six months after the agreement, or laying

\*122. In *Chitty on Bills* (11th Am. ed.), \*92, note (e), a stock-jobbing transaction is defined as follows: "Neither buyer nor seller have any stock, but the buyer agrees nominally to buy of the seller stock (say £1000) on a certain day. When that day arrives, if the stock is at a lower price than when the bargain was made, the buyer pays the seller as much *per cent.* on the £1000 as the stock has fallen; but, if the stock has risen, the seller pays the buyer in a similar way. The sums so paid are called differences. In fact, a time bargain is a mere wager, the seller betting that the stock will fall, the buyer that it will rise." See *Rawlings vs. Hall*, 1 C. & P. 13, note (a). Whether a legal contract, giving a right of action, can arise out of illegal transactions, or by payments made on account of another in settling differences upon transactions within the Stock-jobbing Act, *Quære*. *Ex parte Daniels*, 14 Ves. 191.



the wager, to sue for and recover the same from the person receiving the same, etc.<sup>1</sup>

There were numerous decisions under "Sir John Barnard's Act," the most important of which have been classified under the following heads:

1. *Nature of Stocks embraced in the Act.*—The act only applied to "public stocks," and not to railway and joint-stock

<sup>1</sup> The following is an interesting history of "time bargains," from Beawes, Lex. Mer. 482 (5th ed. 1792):

*"Time Bargains."*

"But if the business of Stock-Brokers was confined solely to buying and selling the real Property of their Employers in the Funds, there would not be Half the number that now follow this Profession; it is therefore necessary to take notice, that the interest which Foreigners have in our funds, particularly the Dutch, gave rise to Time Bargains—that is to say, to contracts for purchasing and selling any Quantity of Stock to be delivered or adjusted at a future time. The usual Times for which Bargains, founded on real Property, and intended to be settled *bona fide*, were made, were from three months to three months, four times within the year; viz. in February, May, August, and November; and those Periods of settling the accounts of such Time Bargains was called the Rescounters, from a Dutch mercantile term for adjusting Accounts Current between merchant and merchant. The Impossibility of ascertaining whether the Commissions from abroad given by letters from Foreigners, or by their Correspondence here, to Brokers to buy and sell Stocks for Time were founded upon real Property or not, gave Birth to Stock Jobbing, or Dealing in the Funds upon Speculation, and the Persons that play at this Game, for Gaming it is of the first Magnitude, whether Principals or

Brokers, are called Stock Jobbers. They purchase or sell for a given time, frequently without being possessed of any property in the Funds they bargain for, merely upon speculation. For instance, A imagines that a Peace, or some other advantageous national Event, will raise the Price of any given Fund within the space of three months considerably above the price of the Day on which he makes his Time Bargain: On this Principle he gives his Broker Orders to buy a large Quantity to be taken and paid for three months from that date; when the time expires, if the Stock has risen according to his expectation, instead of taking it, for probably it has been bought of a person, who had it not to sell even, he receives from the Broker the Difference in money between the price on the day the Bargain was made, and the price at the expiration of the three months, and this is his Profit. If, on the Contrary, the Stock has fallen below the price of the day on which he purchased for three months, he must pay the Difference, and this will be a losing Account. It is computed that the Bargains on Stock Jobbing Accounts made in the course of a year exceed by many millions the transfers made at the Books of real Property, and the Conclusion is apparent that great Fortunes are made and lost by Stock Jobbing. It is to be observed likewise, that the Brokers job for their own account, which occasions frequently Failures at the Stock Exchange."

shares.<sup>1</sup> It did not apply to time bargains in foreign funds;<sup>2</sup> nor were such agreements illegal at common-law.<sup>3</sup> The act was confined to the stocks of England, and not of other countries;<sup>4</sup> and time bargains in India funds were held valid upon appeal to the Privy Council.<sup>5</sup> But jobbing in *omnium* was within the statute.<sup>6</sup>

2. *Transactions under the Statute.*—The act did not apply where the seller was really possessed of the stocks intended to be transferred;<sup>7</sup> and it was sufficient if at the time of the sale, through the medium of a Broker, the principal was possessed of the stock, although his name was not disclosed by the Broker.<sup>8</sup> A person who had *omnium* was considered as potentially in possession of stock, and could legally contract to sell out *omnium* to be replaced by stock.<sup>9</sup>

So where C., being indebted to G. in £1000, agreed to transfer within a given time £100 per annum, long annuity, at the then price, and in the meantime pay G. the dividends, and that the debt of £1000 should constitute part of the purchase-money, but the stock was not purchased at the time, and there was a rise in the price of the same—held, that the agreement was not usurious or within the Stock-jobbing Act;<sup>10</sup> and there was nothing in the statute to prevent a loan of

<sup>1</sup> Williams vs. Tyre, 18 Beav. 366; 3; Paterson vs. Powell, 9 Bing. 329; Hewitt vs. Price, 5 Sco. N. R. 229, 2 Moo. & S. 399. See Bryan vs. and 4 Man. & G. 355; 3 Railw. Cas. Lewis, Ry. & M. 386; Lorymer vs. 175; Ex parte Turner, 3 De G. & J. Smith, 1 B. & Cr. 3. 46, and cases cited; Thacker vs. <sup>5</sup> Id. Hardy, L. R. 4 Q. B. Div. 685, 689; <sup>4</sup> Id. Noyes vs. Spaulding, 27 Vt. 429. <sup>6</sup> Ramloll Thackoorseydass vs. Soojumnull Dhondmull, 12 Jur. 315.

<sup>2</sup> Ellsworth vs. Cole, 2 M. & W. 31; 2 Gale, 220; Henderson vs. Bise, 3 Stark. 158; Wells vs. Porter, 3 Sco. 141; s. c. 2 Bing. N. C. 722; 2 Esp. 631; s. p., Oliverson vs. Coles, 2 Hodg. 78; Oakley vs. Rigby, 3 Sco. 194; s. c. 2 Bing. N. C. 732; 1 Stark. 496. <sup>7</sup> Saunders vs. Kentish, 8 T. R. 162; Tate vs. Wellings, 3 id. 531. <sup>8</sup> Child vs. Morley, 8 id. 610. <sup>9</sup> Oliverson vs. Coles, 1 Stark. 496. <sup>10</sup> Clark vs. Giraud, 1 Madd. 511.

stock—*i. e.*, a transfer of stock from A to B on the strength of an understanding by B that the same stock, or a like amount of stock, should be retransferred to A at a future day.<sup>1</sup>

An executory contract to transfer stock of which the party was not possessed was, however, regarded as void and illegal, although the transaction did not fall within the mischief, as it certainly did not within the express prohibition, of the act, inasmuch as an actual transfer of the stock was intended.<sup>2</sup> So a contract to pay the difference which may become due on the settling-day on the sale of consols is void.<sup>3</sup>

In respect to the procedure under the act, the court held, in *Windale vs. Fall*,<sup>4</sup> that the six months in the first section meant lunar months, and no discovery lay where the cause of action arose prior to the expiration of six lunar months; and a plea of the Stock-jobbing Act to a bill for discovery of stock transactions was overruled, the second section of the act requiring parties to make a discovery whereon to found an action.<sup>5</sup>

The second section of the act—which enacted as follows: “That for the better discovery of the moneys or premiums which shall be given, paid, or delivered, etc., every person liable to be sued shall be obliged, etc., to answer under oath, etc., any bill of discovery in equity,” etc.—only applied to discoveries as to moneys recoverable back, and not to the recovery of penalties under the fifth and eighth sections.<sup>6</sup>

In an action to recover damages against one who had refused to accept and pay for stock agreed to be sold to him, it was necessary to prove an actual transfer of the stock to some

<sup>1</sup> *Saunders vs. Kentish*, 8 T. R. 162.

<sup>4</sup> 3 Bro. C. C. 11.

<sup>2</sup> *Mortimer vs. McCallan*, 9 M. & W. 636; 6 id. 70; 7 id. 20.

<sup>5</sup> *Bancroft vs. Wentworth*, 3 Bro. C. C. 9 note.

<sup>3</sup> *Sawyer vs. Langford*, 2 C. & K. 697.

<sup>6</sup> *Bullock vs. Richardson*, 11 Ves. 373.

other person before the action brought; and the proof alone of a contract to sell to such other person before the action brought, though followed up by an actual transfer afterwards, was not sufficient to sustain the action.<sup>1</sup> But it seemed not to have been necessary for the plaintiff to show that he made such transfer on the next possible day after default made by the original contractor, though delay affected the damages.<sup>2</sup> The act did not compel a party in a court of law to give evidence criminating himself; and therefore, in an action on a bill at the suit of an endorser against the acceptor, it was held that the drawer, a Stock-broker, might refuse to give evidence that the consideration for it was Stock-jobbing differences, though such Broker was bound to produce his books.<sup>3</sup> A Stock-broker was held bound, however, to discover the names of the persons for whom he had purchased shares in a company which had not been incorporated, chartered, or registered.<sup>4</sup> Nor could such a Broker resist a discovery under 7 Geo. II. c. 8, by alleging the illegality of the transaction, no penalty being imposed by the act.<sup>5</sup>

But in *Pritchett vs. Smart*<sup>6</sup> the court refused to entertain an application by a defendant, in an action on a bill of exchange, to compel the plaintiff, as Stock-broker, to produce his books kept pursuant to this section,<sup>7</sup> in order to enable the defendant to plead the statute.

3. *Actions for Money Used, etc., and Commissions in Stock-jobbing Transactions.*—Where, to an action of debt upon a

<sup>1</sup> *Heckscher vs. Gregory*, 4 East, 607. A different rule was, however, laid down in New York in the case of *Vaupell vs. Woodward*, 2 Sandf. Ch. 145, 146.

<sup>2</sup> *Bordenave vs. Gregory*, 5 East, 107; *Dorriens vs. Hutchinson*, 1 Smith, 420. Whether an action of assumpsit can be supported on statute 7 Geo. II. c. 8, see *Billings vs.*

*Flight*, 2 Marsh. 124; 6 Taunt. 419; *Billings vs. Polley*, 2 id. 125 n.; 6 Taunt. 422.

<sup>3</sup> *Rawling vs. Hall*, 1 C. & P. 11; *Thomas vs. Newton*, 2 id. 606.

<sup>4</sup> *Aston's Case*, 27 Beav. 474.

<sup>5</sup> *Williams vs. Trye*, 18 Beav. 366.

<sup>6</sup> 7 C. B. 625.

<sup>7</sup> § 9 of act.

bond, the defendant pleaded the act of 7 Geo. II. c. 8, that the plaintiff and one R. were jointly concerned in certain contracts contrary to that statute; that the plaintiff voluntarily paid the differences; and that the bond was given by the defendants for securing to the plaintiff R.'s proportion of that loss—on demurrer, the court were clearly of opinion that the plaintiff was entitled to recover the amount which he had paid under the special authority of R., though for an illegal purpose.<sup>1</sup>

Upon the authority of the last-named case, the court, in *Petrie vs. Hanney*,<sup>2</sup> held, against the opinion of Lord Kenyon, that where two persons engaged jointly in an illegal stock-jobbing transaction, and incurred losses, and employed a Broker to pay the differences, and one of them, with the privity and consent of the other, repaid the whole sum to the Broker, he might recover a moiety from the other as money paid to his use, notwithstanding the statute 7 Geo. II. c. 8, on the ground that the defendant had expressly authorized the plaintiff to make the payment for him.

But these cases were afterwards departed from, and are no longer regarded as authority in England.<sup>3</sup>

Thus in *Thwaite vs. Warner*,<sup>4</sup> where parties were engaged in stock-jobbing transactions, in violation of the statute, the court held that one of them would not be permitted to maintain an action against the other to recover money paid to a Broker under such transactions.

<sup>1</sup> *Faikney vs. Reynous*, 4 Burr. 2069; *Booth vs. Hodgson*, 6 T. R. 405; 1 W. Black. 633, and cases cited note (n), where this case is considered as overruled. <sup>2</sup> 3 T. R. 418.

<sup>3</sup> See 2 Chitty on Cont. (11th Am. ed.) 896 and 897, citing *McBlair vs. Gibbes*, 17 How. (U. S.) 232, 236; and commented upon in *Paley on Armstrong vs. Toler*, 11 Wheat. 258; *Age. by Lloyd*, 119 n. (t). See also remarks of Church, C. J., in *Woodworth vs. Bennett*, 43 N. Y. 278. <sup>4</sup> *Esp. N. P. Dig.* 88.

And the direct question was at issue in *Cannan vs. Bryce*,<sup>1</sup> where it was decided that money lent, and applied by the borrower for the express purpose of paying or compounding differences on illegal stock-jobbing transactions to which the lender was no party, cannot be recovered back by him in an action for money had and received.<sup>2</sup>

So, there are several cases in which the results of stock-jobbing transactions were represented by bills, checks, or other written instruments, and the courts have concurred in the above rule of law.

In *Ex parte Bulmer*,<sup>3</sup> promissory notes were given by a Stock-broker for the balance of an account of money advanced to him to be employed in stock-jobbing transactions, contrary to the statute. Part of the consideration consisted of the profits of these transactions. Proof under his bankruptcy was restrained to the residue—viz., the money received which he had applied to his own use. So a bill given for the amount of stock-jobbing differences was held void in the hands of an endorsee with notice,<sup>4</sup> and where it had been endorsed for value after it became due.<sup>5</sup> And a bond given to an endorsee to recover payments of a note originally given for an illegal stock-jobbing transaction, of which the endorsee had notice before he took the bond, was held void.<sup>6</sup> But a bill of exchange or promissory note given upon a stock-jobbing transaction is valid in the hands of a party who afterwards took it, before it was due, for value, and without notice of the illegal consideration.<sup>7</sup>

<sup>1</sup> 3 B. & Ald. 179.

<sup>2</sup> See also *McKinnel vs. Robinson*, 3 M. & W. 434.

<sup>3</sup> 13 Ves. Jun. 313.

<sup>4</sup> *Steers vs. Lashley*, 6 T. R. 61; 1 Esp. 166.

<sup>5</sup> *Brown vs. Turner*, 7 T. R. 630; 2 Esp. 631.

<sup>6</sup> *Amory vs. Meryweather*, 4 D. & Ry. 86; 2 B. & Cr. 573.

<sup>7</sup> *Day vs. Stuart*, 6 Bing. 109; 3 M. & P. 334; *Greenland vs. Dyer*, 2 M. & Ry. 422; *Amory vs. Meryweather*, 2 B. & C. 573; 4 D. & R. 86. See *Rawlings vs. Hall*, 1 C. & P. 11, as to evidence, etc.

To a declaration for work done, commissions, and for money paid, a plea that the plaintiff was a stock and share Broker, and as such made contracts with persons for the defendant by way of wagering, contrary to 8 and 9 Vict. c. 109, under the semblance of pretended sales, respecting the future market price of public and other stock, shares, and scrip, whereby the defendant was to receive or pay the difference between the price of the said public stock on the days on which the contracts were made and the price on certain future days, according as the price had become lower or higher; and that the work was done, and the commission claimed in respect of the making such contracts, and the money paid in discharging the differences which had become payable—held, first, that this was no defence under the statute of Vict.; secondly, that the plea disclosed no defence under the Stock-jobbing Act, as it was not alleged that each contract related to *public stock*.<sup>1</sup>

In an action by the assignees of a bankrupt, for money received by the defendant for their use, it appeared that the defendant was official assignee of the Stock Exchange for the management of the estates of those members who, being unable to fulfil their engagements on the Stock Exchange, became defaulters. Before the receipt of the money, the bankrupt, a Stock-broker and member of the Stock Exchange, was declared a defaulter, having at the time contracts open with the members of the Stock Exchange, which had the form of legal contracts, for the sale and delivery of stock; but there was no intention that stock should be delivered, and the contracts were to be settled by the payment of differences. Under the rule of the Stock Exchange, the defendant collected the differences upon the contracts upon which the bankrupt was a gainer, and, before notice of an act of bankruptcy, dis-

<sup>1</sup> *Query*, whether the defence under the other act (*Knight vs. Fitch*, 15 the latter act was open on the plea, C. B. 566; 1 Jur. (n. s.) 526; 24 L. J. reference being expressly made to C. P. 122).

tributed among members to whom he was indebted for differences all said money except a small amount, which was paid over after he was adjudged a bankrupt to the treasurer of a fund for decayed members, according to the rules of the Stock Exchange. Held, that the action could not be maintained. As to the money paid over before the adjudication of the bankruptcy, it was not money had and received by the defendant to the use of assignees of the bankrupt; and as to the money paid over after the adjudication of bankruptcy, the contracts, as well as the payment and receipt of the differences, being illegal by 7 Geo. II. c. 8, neither the bankrupt nor his assignees could maintain an action to enforce the contracts or recover the sums paid; and that the differences were not paid to the defendant as the agent of the bankrupt, but for the purpose of being distributed among his Stock Exchange creditors.<sup>1</sup>

In June, 1860, the act of George II. was totally repealed, the text of the repealing act clearly indicating that, after a trial of one hundred and twenty-five years, the English people were satisfied that dealings in the public securities should be left untrammelled, even at the cost of having business men speculate in them. The preamble to the act is as follows: "Whereas an act was passed, in the seventh year of the reign of King George the Second, chapter eight, to prevent the practice of stock-jobbing, and by another act, passed in the Tenth year of the said King's reign, chapter eight, the said first-mentioned act was made perpetual. And whereas the said acts impose unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities, and it is therefore expedient to repeal the same: Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Com-

<sup>1</sup> *Nicholson vs. Gooch*, 5 El. & Bl. 999; 2 Jur. (n. s.) 303; 25 L. J. C. P. 137. For actions by Brokers for commissions and money laid out in transactions contrary to act relating to wagers, see post, p. 420.



mons, in the present Parliament assembled; and by the authority of the same, as follows: I. From and after the passage of this act, the said two several acts before mentioned shall be, and the same are hereby, repealed.”<sup>1</sup>

The repeal of the act of George II. of course immediately swept away all restrictions upon dealings in the public stocks, and placed persons in reference thereto in the same condition as if they were dealing in shares of private or other corporations. But it should be stated in this connection that there is an existing English statute relative to the sale or transfer of shares in any joint-stock banking company, the substance of which is given below.<sup>2</sup> The object of this enactment is to prevent runs on banks, which might be occasioned by a fall in the price of their shares resulting from “short” sales or gambling transactions.

In the State of New York, an act against stock-jobbing is found among the Revised Laws passed in 1812, the text of which is:

“That all contracts, written or verbal, hereafter to be made, for the sale or transfer, and all wagers concerning the prices present or future, of any certificate or evidence of debt due by or from the United States or any separate state, or any share or shares of the stock of any bank, or any share or shares of the stock of any company established, or to be established, by any law of the United States, or any individual state, shall be, and all such contracts are hereby declared to be abso-

<sup>1</sup> 23 and 24 Vict. c. 28. See also *Thacker vs. Hardy*, L. R. 4 Q. B. D. 685, 688; *Lathavo vs. Barber*, 6 T. R. 70.

<sup>2</sup> By 30 Vict. c. 29, § 1, it is enacted that all contracts made after the 1st day of July, 1867, for the sale or transfer of any shares, stock, or interest in any joint-stock banking company in England or Ireland, constituted under or regulated by any act of Parliament, royal charter, or letters - patent, issuing shares or stock, transferable by any written instrument, shall be void unless such contract sets forth in writing the distinguishing numbers of such shares, stock, or interest on the register; or, if there is no register, the person in whose name such shares, stock, or interest shall at the time of making such contract stand in the books of the company.

lutely void; and both parties are hereby discharged from the lien and obligation of such contract or wager; unless the party contracting to sell and transfer the same shall at the time of making such contract be in the actual possession of the certificate, or other evidence of such debt or debts, share or shares, or to be otherwise entitled in his own right or duly authorized or empowered by some person so entitled to transfer the said certificate, evidence, debt or debts, share or shares, so to be contracted for. And the party or parties who may have paid any premium, differences, or sums of money in pursuance of any contract, hereby declared to be void, shall and may recover all such sums of money, together with damages and costs, by action on the case, in assumpsit for money had and received to the use of the plaintiff, to be brought in any court of record.”<sup>1</sup>

This statute was re-enacted by the Revised Statutes of 1830 in the language given in the notes.<sup>2</sup> There were a number of decisions under these New York statutes, a reference to the principal of which will be found pertinent in this connection.

The act did not apply to sales of distributive shares of the effects of a dissolved corporation, such shares not being stock, but were non-negotiable things in action.<sup>3</sup> It was likewise held not to apply to any other kind of property than stocks.<sup>4</sup>

In the case of *Frost vs. Clarkson*,<sup>5</sup> where a vendor, by contract in writing, agreed to transfer one hundred shares of stock in sixty days, and it appeared that he owned that num-

<sup>1</sup> 2 R. L. 187, § 18; *Frost vs. Clarkson*, 7 Cow. (N. Y.) 26.

<sup>2</sup> “All contracts for the sale of stocks are void unless the party contracting to sell the same shall at the time of making such contracts be in the actual possession of the certificates of such shares, or to be otherwise entitled thereto, in his own

right, or to be duly authorized, by some person so entitled, to sell the certificates or shares so contracted for” (1 Rev. Stat. 710, § 6).

<sup>3</sup> *James vs. Woodruff*, 10 Paige, 541; *aff’d* 2 Den. 574, but opinion not reported.

<sup>4</sup> *Cassard vs. Hinman*, 1 Bosw. (N. Y.) 207. <sup>5</sup> 7 Cow. (N. Y.) 26.

ber at the time of making the contract, but in the interval between the contract and time of transfer sold sixty shares, leaving him the owner of only forty shares, it was decided that the statute<sup>1</sup> did not avoid such a contract, and that it only applied where the vendor did not own the stock at the time the agreement was made; that the sale was not of any particular one hundred shares, but any one hundred shares in the company; and if the vendor is ready to receive a transfer and pay, any other one hundred shares may be procured in the market. Subsequently<sup>2</sup> the Court of Appeals held that where a Broker sold for his principal shares of a certain stock which neither owned at the time of the sale, deliverable at the option of the principal in thirty days—the transaction being illegal—the principal, under the maxim *in pari delicto potior est conditio defendentis*, could not recover from the Broker any differences to which he might otherwise be justly entitled; and that section 8,<sup>3</sup> giving an action to recover back money paid or property delivered did not aid the plaintiff, as that section only applied to the parties who actually paid or delivered the money and to those who actually received it—viz., the Broker defendant, and the third person to whom the Broker had made the sale of the stocks. So it was further held that to avoid a contract as against the Stock-jobbing Act the burden of proof is upon the party alleging a violation to show that when the contracts were made the other party did not own, and was not authorized to sell, the stock contracted for; that where a contract is valid on its face all the plaintiff has to do to entitle him to recover is to show a readiness and offer on his part and a refusal by the defendant; and that such a contract at common-law and in the absence of statute being clearly valid, the courts will not presume that

<sup>1</sup> 2 R. L. 187, § 18.

<sup>2</sup> *Staples vs. Gould*, 9 N. Y. 520.

<sup>3</sup> 1 Rev. Stat. 710.

<sup>4</sup> *Dykers vs. Townsend*, 24 N. Y. 57.

the party contracting to sell stocks was not the owner thereof for the purpose of rendering the contract void. The court refused to recognize a contrary doctrine laid down by the Supreme Court of Massachusetts in *Stebbins vs. Leowolf*,<sup>1</sup> which arose out of a contract made in the State of New York.<sup>2</sup>

But where one placed money in the hands of a Broker to indemnify him for any losses which might accrue upon the sale of stock, which the Broker was to make for him on time, in violation of the above statute, he can recover it back if the Broker has not paid it over, without notice of the illegality or not to pay.<sup>3</sup>

In *Vaupell vs. Woodward*,<sup>4</sup> the question arose as to whether, in an action by a Broker against a purchaser for not accepting stock sold on time, it was not incumbent on the Broker to prove a resale before bringing his action. The argument in favor of this view was, that a Broker with 100 shares of a particular stock could make a dozen or more sales of 100 shares of that stock to as many different persons on time; and, on their failure to perform, might sustain a suit against them all, upon proof of his having owned the 100 shares; and that, if all the buyers should fulfil and demand their stocks, his 100 shares would not go far towards completing the contracts on his part. The English Stock-jobbing Act, it appeared, contained a provision requiring such a resale on time contracts. While the court admitted the cogency of this argument, it nevertheless overruled the same, and held that the statute contained no provision requiring a resale, and that the apparent defect could only be remedied by further legislation. In another case<sup>5</sup> it was further held, that a Broker who

<sup>1</sup> 67 Mass. 143.

<sup>2</sup> See also *Staples vs. Gould* (decision below), 5 Sandf. (N. Y.) 411; *McIlvaine vs. Egerton*, 2 Rob. (id.) 422.

<sup>3</sup> *Gram vs. Stebbins*, 6 Paige, Ch. 124.

<sup>4</sup> 2 Sandf. Ch. 145, 146.

<sup>5</sup> *Genin vs. Isaacson*, 6 N. Y. Leg. Obs. 213.

purchased for another by the express direction of the latter, and did not himself agree to sell, was not within the act. In this case there was no evidence that the sellers were not possessed of the stock when they agreed to sell it.<sup>1</sup>

It seems, however, that the statute of New York was not very efficacious in preventing "short sales" of stock,<sup>2</sup> and in the year 1858 it was repealed by an act which is herewith given in full:

"No contract, written or verbal, hereafter made for the purchase, sale, transfer, or delivery of any certificate, or other evidence of debt, due by or from the United States, or any separate state, or of any share or interest in the stock of any bank, or of any company incorporated under any law of the United States, or of any individual State, shall be void, or voidable, for any want of consideration, or because of the non-payment of any consideration, or because the vendor at the time of making such contract is not the owner or possessor of the certificate or certificates, or other evidence of such debt, share, or interest."<sup>3</sup>

By this act the selling of securities "short" is legalized, and the doctrine of the common-law re-established. The courts of New York have held that the effect of the repeal of the statute relating to Stock-jobbing takes away the defence of illegality as to contracts made during its existence, precisely as if such statute had never been passed; the theory of the law being that the repeal of a statute which makes contracts illegal on the ground of public policy, legalizes those entered into during its continuance, in violation of the same.<sup>4</sup> Nor is it necessary, in an action to recover damages

<sup>1</sup> See also *Cassard vs. Hinmann*, 14 How. (N. Y.) Pr. 84; *aff'd* 1 Bosw. 207; *Thompson vs. Alger*, 53 Mass. 428, where the New York statute is construed.

<sup>2</sup> See remarks of Hoffman, J., in *Cassard vs. Hinman*, *supra*.

<sup>3</sup> Ch. 134, laws 1858.

<sup>4</sup> *Washburn vs. Franklin*, 35 Barb. (N. Y.) 599; s. c. 13 Ab. Pr. 140;

for the non-performance of a contract for the purchase of stock, for the plaintiff to allege in his complaint that he was the owner of the stock at the time of making the contract, or that the contract was in writing.<sup>1</sup>

The effect of the repeal of the Stock-jobbing statute, however, was not to avoid the necessity of having a contract for the sale of shares of stock reduced to writing, within the Statute of Frauds. The latter statute is still in force, and unaffected to the extent, at least, of requiring such a contract to be in writing properly subscribed.<sup>2</sup>

In the State of Massachusetts<sup>3</sup> there is a law which declares that a contract for the sale or transfer of a certificate, or other evidence of debt due from the United States, or a state, or of any stocks, or any share or interest in the stock, of a bank, company, city, or village incorporated under a law of the United States, or a state, is void, unless the party contracting to sell or transfer the same is, at the time of making the contract, the owner or assignee thereof, or is authorized by the owner or assignee, or his agent, to make the sale or transfer. This statute has been before the courts for construction in several cases.<sup>4</sup>

In *Durant vs. Burt*<sup>5</sup> the court held that where a Client gave his Broker an order to purchase stock for him, and the Broker does so, in accordance with the instructions and the usages of the Stock Exchange, and the Client subsequently

rev'd 24 How. Pr. 515; 11 Ab. Pr. 93.

<sup>1</sup> Id.

<sup>2</sup> *Johnson vs. Mulry*, 4 Robt. (N. Y.) 401.

<sup>3</sup> Laws 1836, ch. 279; Gen. Stat. Mass. ch. 105, §. 6.

<sup>4</sup> *Barrett vs. Mead*, 92 Mass. 337; *Barrett vs. Hyde*, 73 Mass. 160; *Durant vs. Burt*, 98 id. 161; *Price vs. Minot*, 107 Mass. 49; *Brown vs. Phelps*, 103 id. 313, 314; *Brigham vs. Mead*,

92 Mass. 245. See also *Stebbins vs. Leowolf*, 57 Mass. 137; *Thompson vs. Alger*, 53 Mass. 428; opinion of Parker, C. J., in *Howe vs. Starkweather*, 17 Mass. 243; *Sargent vs. Franklin Ins. Co.*, 25 Mass. 98. See also *United States vs. Vaughan*, 3 Binn. 394. See also, for other cases interpreting the Mass. statute, *Rock vs. Nicholls*, 85 Mass. 342; *Colt vs. Clapp*, 127 Mass. 476.

<sup>5</sup> *Supra*.

refuses to take the stock, should the Broker, after notice, sell it, the latter is entitled to recover the loss sustained, together with his commissions. And it is no defence to the action that the contract made by the Broker with another member of the Stock Exchange was illegal, as being contrary to the above statute of Massachusetts, especially where the purchasing Broker is not shown to have known this fact, or that the same was not legal under the Statute of Frauds. The court further decided that the plea that the contract was illegal, because made by the Broker with another member of the Stock Exchange, in violation of the above statute, was no defence to the action; especially where the purchasing Broker is not shown to have been aware of this fact, or to have been aware that the contract was illegal under the Statute of Frauds. The case of *Brown vs. Phelps*<sup>1</sup> also arose under the Stock-jobbing Statute of Massachusetts. There a Broker, employed to purchase stock, contracted for it in his own name with J. S., who owned it at the time, but had made a prior contract for its sale. The employer, for groundless reasons, repudiated the contract; but the Broker, having no knowledge of, or reason to suspect, the prior sale by J. S., paid for the stock when tendered to him. Held, that the statute<sup>2</sup> making void contracts for the sale of stocks not owned by the seller did not debar the Broker from recovering from his employer the amount so paid.

"The defendant," said the court, "contends that the case of *Stebbins vs. Leowolf* is a decisive authority against the plaintiff's claim in respect to these shares. That case related to a statute of the State of New York, but our own statute is substantially like it, and must receive the same construction. In that case the plaintiff had contracted to purchase the stocks as agent of the defendant; but he was conversant with all

<sup>1</sup> 103 Mass. 313.

<sup>2</sup> Gen. Stat. ch. 105, § 6.

the facts and of the objections to the validity of the contract entered into by him, and volunteered to pay the claims of the vendors of the stock without any legal liability on his part. Under these circumstances, the court say that he must be taken to have paid the money in his own wrong, if the contract he entered into was in fact illegal. And they held that the burden of proof was on him to show a legal contract, in order to make a *prima facie* case. The decision was in conformity with the elementary law of agency, according to which, if an agent knowingly pays money on an illegal contract, after it has been repudiated by his principal, he cannot thereby bind his principal. But in the present case no such knowledge of facts appears in the agreed statement. The plaintiffs contracted to purchase the shares of one who actually owned them. They were not bound to presume that he had previously contracted to sell them; and there was nothing to put them on inquiry; nor does it appear that they had any means of ascertaining, by the use of reasonable diligence, what private contracts Spencer had made with other persons."

So it has been held<sup>1</sup> that the statute did not apply where the contracting party had, as a Broker, previously sold the same number of shares of the same corporation in violation of his instructions, and had agreed to deliver the stock on demand, on payment of a certain sum. Nor is an agreement to purchase stocks for another, and sell them again within a certain time, and share the profits, but bear alone any loss, within the statute. And a contract for the sale of railroad stock by one who had originally pledged it, and of which the pawnee held the certificate, but which the pawnor had authorized the pawnee to sell whenever he had an opportunity, is not within the New York statute concerning stock-jobbing.<sup>2</sup>

A promissory note given in consideration of money paid

<sup>1</sup> Barrett vs. Hyde, 73 Mass. 160.

<sup>2</sup> Thompson vs. Alger, 58 Mass. 423.



by request of the maker to a Broker, for losses sustained in stock-jobbing, negotiated by the latter for the former, in violation of the statute, is valid; but money paid for losses in stock-jobbing cannot be recovered back.<sup>1</sup> Nor can the payee of a check received in payment for shares, which were not owned by him at the time when he undertook to sell them, maintain an action thereon against the drawer.<sup>2</sup>

A promise by the holder of more than 300 shares in the stock of a corporation, to transfer 300 shares whenever he shall acquire enough shares to enable him to do so, and still retain a majority of all the shares in the corporation, is not within the statute.<sup>3</sup>

An interesting case arose in the Supreme Court of Massachusetts, in which the validity of speculations in selling certain stock "short" in New York was reviewed under the statute of that State. The case had been referred to an auditor. The facts showed that the plaintiffs in 1872 were partners as Brokers in New York. Prior to that time the defendants' testator, D., had employed and made sales and purchases of stock through them. On the 25th of October, 1872, the plaintiffs received and executed an order from D. to sell "short" 100 shares of the "common" stock of the Chicago and Northwestern Railway, and on the 26th they received and executed an order to sell another 100 shares. The first was sold at \$76 $\frac{3}{8}$  per share and the latter at \$82 $\frac{3}{8}$ .

The auditor found that in "short" sales the seller is required neither to own nor part with the stock sold. The seller's Broker borrows the stock and pays the agreed price, generally in a certified check. The borrower or lender may at any time close the transaction, the one by tendering and the other by demanding the stock. If called for and not re-

<sup>1</sup> Wyman vs. Fiske, 85 Mass. 238.

<sup>3</sup> Price vs. Minot, 107 Mass. 49.

<sup>2</sup> Rock vs. Nichols, id. 342.

turned, the lender has a right to buy in the stock at the market price, and, in case of an advance, to charge the borrower with the difference. With this course D. was familiar. On November 23, 1872, O. & Co., of whom the plaintiffs had borrowed the stock, called for its return. Since November 20 the stock had been rapidly rising, and on the 21st, 22d, and 23d the plaintiffs "addressed" numerous letters and telegrams to D., asking him to come and settle or cover his margins. The plaintiffs received no reply, and they proceeded to act on D.'s previous general instructions—to use their discretion in the protection of his interests. On November 23, therefore, they bought 100 shares at \$150, and, on November 25, 100 more at \$175 per share, and with these 200 replaced the stock borrowed from O. & Co. The loss on the transaction was \$16,625. The plaintiffs had a previous balance of \$1924.28 to the credit of D. The balance due them was, therefore, \$14,700.72, and this sum, with interest, was sought to be recovered against D.'s estate. The defendants set up several defences. The first was that the sales were illegal: if not illegal, that the plaintiffs failed to give due notice to D. to make his margin good (there being no evidence that the letters and telegrams were delivered), or that in default thereof the plaintiffs would buy in stock to replace that borrowed; that if there was notice the plaintiffs were only bound to furnish "preferred" stock, which sold at \$87.25 on November 23 and 25, instead of "common;" and that the plaintiffs bought stock for a less price in transactions of their own on the same day. There was also a declaration in set-off for the \$1924.28 had and received by the plaintiffs to the defendants' use. The auditor found that the plaintiffs were entitled to recover in the sum of \$18,829.09, but the case was recommitted to him to report the evidence, which he did. Coming before the Supreme Court, the case was

opened to a jury and the report of the auditor submitted. The defendants' counsel contended and argued that although such a transaction, if proved, was authorized by the statute of New York which permitted stock-jobbing and such "short" sales, still a court of Massachusetts was not bound by comity to enforce the contract here, there being an express statute of the state prohibiting such transactions, and, apart from such statute, that the transaction was contrary to public policy and good morals. It was contended and argued at length by the counsel for the plaintiffs that such a contract was not illegal, and that it could be enforced by the Massachusetts courts; that being valid in New York, where the contract was made, it could be enforced here, where the remedy is sought. In the New York case of Knowlton vs. Fitch,<sup>1</sup> the court held that, so long as these transactions are not prohibited by law, there is no reason for relieving either party from the responsibilities which he incurs by engaging in them. The court ruled that the action could not be maintained, and directed a verdict for the defendants.<sup>2</sup>

A similar statute also existed in Pennsylvania,<sup>3</sup> but it has been repealed.<sup>4</sup> By the revised statutes of Illinois,<sup>5</sup> it is enacted that "whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any such commodities, shall be fined not less than \$10 or more than \$1000, or con-

<sup>1</sup> 52 N. Y. 288.

<sup>2</sup> Leonard vs. Hart, N. Y. *Herald*, Oct. 2, 1877.

<sup>3</sup> Act of May 22, 1841 (L. 1831, p. 398), § 6.

<sup>4</sup> For decisions under this statute, see *Chillas vs. Snyder*, 1 Phila. (Pa.) 289; *Krause vs. Setley*, 2 id. 32.

<sup>5</sup> Ch. 38, § 130 (Cothran's ed. 1881).

fined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and void.<sup>1</sup>

In this connection it should also be stated, that contracts for the purchase or sale of gold are legal.<sup>2</sup> The theory of these cases is, that where a contract is made for the sale or purchase of gold, the latter is regarded as a commodity, and subject to all the rules of law relating to agreements for the purchase or sale thereof—as, for instance, the Statute of Frauds, requiring in certain cases a memorandum in writing.<sup>3</sup> So, in the case of *Appleman vs. Fisher*,<sup>4</sup> a contract to sell gold “short” was upheld as legal.

By an act of the Congress of the United States passed in March, 1863,<sup>5</sup> “all contracts for the purchase or sale of gold or silver coin or bullion, and all contracts for the loan of money or currency secured by pledge or deposit, or other disposition of gold or silver coin of the United States, if to be performed after a period exceeding three days, shall be in writing or printed, and signed by the parties, their agents, or attorneys, and shall have one or more adhesive stamps, as provided in the act to which this is an amendment, equal in amount to one half of one per centum, and interest at the rate of six per centum per annum on the amount so loaned, pledged, or deposited. And if any such loan, pledge, or de-

<sup>1</sup> For decisions under this act, see *Pickering vs. Cease*, 79 Ill. 328; *Pixley vs. Boynton*, id. 351; *Sanborn vs. Benedict*, id. 309; *Walcot vs. Heath*, 78 id. 433; *Cole vs. Milmine*, 88 id. 349. See also the able and interesting charge of Mr. Justice Jamieson, to a grand-jury of the criminal court of Chicago, October 12, 1881, given in full at p. 470, in which the statute is interpreted and discussed.

<sup>2</sup> *Peabody vs. Speyers*, 56 N. Y. 230;

*Bigelow vs. Benedict*, 9 Hun (N. Y.), 429, aff'd 70 N. Y. 202; *Fowler vs. Gold Exchange Bank*, 67 id. 138-146; *Chatterton vs. Fisk*, 1 Ab. New Cas. 88; *Mills vs. Gould*, id. 93.

<sup>3</sup> Id.

<sup>4</sup> 34 Md. 540. For construction of certain contracts relating to the purchasing or selling of gold, *Kinne vs. Ford*, 43 N. Y. 587; *Meyer vs. Clark*, 45 id. 285.

<sup>5</sup> March 3, 1863, 2 Bright. Stat. at Large, 144; 12 U. S. Stat. 719.

posit, made for a period not exceeding three days, shall be renewed or in any way extended for any time whatever, said loan, pledge, or deposit shall be subject to the duty imposed on loans exceeding three days. And no loan of currency or money on the security of gold or silver coin of the United States, as aforesaid, or of any certificate or other evidence of deposit payable in gold or silver coin, shall be made exceeding in amount the par value of the coin pledged or deposited as security; and any such loan so made, or attempted to be made, shall be utterly void. *Provided*, that if gold or silver coin be loaned at its par value, it shall be subject only to the duty imposed on other loans. *Provided*, however, that nothing herein contained shall apply to any transaction by or with the government of the United States; and all contracts, loans, or sales of gold and silver coin and bullion, not made in accordance with this act, shall be wholly and absolutely void; and, in addition to the penalties provided in the act to which this is an amendment, any party to said contract may, at any time within one year from the date of the contract, bring suit before any court of competent jurisdiction, to recover back, for his own use and benefit, the money paid on any contract not in accordance with this act." This act was repealed in 1864.<sup>1</sup>

The history of these stock-jobbing acts seems to prove conclusively that they have never been effective in preventing speculations in stocks. In almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by "the unbridled and defiant spirit of speculation,"<sup>2</sup> despite the earnest efforts of the courts to en-

<sup>1</sup> See 13 U. S. Stat. p. 303; Laws U. S. 1864, ch. 173, § 173; see also Revision of Statutes of U. S. 1874, 2d ed. (1878), p. 1085. An abstract of the

act is, however, given in 1 Ab. Nat. Dig. 553, as late as 1871.

<sup>2</sup> As Mr. Justice Hoffman puts it, in *Cassard vs. Hinmann*, 14 How. (N. Y.) Pr. 84, 90.

force them, they have finally been repealed. It is perhaps better to allow the evil to correct itself, as it surely does, than to bring the administration of justice into contempt by filling the books with useless laws, which are at all times openly violated and laughed at, and which seem hardly more effective to prevent the practices at which they are aimed, than legislation directed against the laws of nature.

### *III. Wagers.*

#### *(a.) At Common-law.*

According to the definition of Mr. Bouvier, which has been substantially sustained by the courts, as appears from the decisions hereafter referred to, "a wager is a bet; a contract by which two parties or more agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening or not happening of an uncertain event."<sup>1</sup> And a contract upon a contingency, by which one may lose, although he cannot gain, or the other may gain, but cannot lose, is a wager, as where property was sold at its real value to be paid for if a third person be elected.<sup>2</sup> Yet in *Quarles vs. The State*<sup>3</sup> it was decided that to constitute a wager there must be a risk by both parties.<sup>4</sup> And in *Cassard vs. Hinman*<sup>5</sup> the court said: "A wager is something hazarded on the issue of some uncertain event; a bet is a wager, though a wager is not necessarily a bet."

Wagers, at common-law, were not *per se* void, unless they were calculated to injure third persons, and thereby disturb the peace and comfort of society, or lead to indecent evidence,

<sup>1</sup> Bouvier's Law Dict. tit. "Wagers."

<sup>2</sup> *Shumate's Case*, 15 Gratt. (Va.) 653.

<sup>3</sup> 5 Humph. (Tenn.) 561.

<sup>4</sup> See also *Marean vs. Longley*, 21 Me. 26; *Trammel vs. Gordon*, 11 Ala. 656; *Fisher vs. Waltham*, 4 Q. B. 889.

<sup>5</sup> 1 Bosw. (N. Y.) 207, on appeal.

or when they militated against the morality or public policy of the country.

Some of the cases will fully illustrate this proposition. A wager on the future price of foreign funds was held legal; <sup>1</sup> so was one whether S. T. had or had not before a certain day bought a wagon belonging to D. C.; <sup>2</sup> also a wager on the age of plaintiff and defendant; <sup>3</sup> and likewise a wager on the result of an appeal from the Court of Chancery to the House of Lords has been held good, no fraud being intended, and the parties having no power to bias the decision. <sup>4</sup> On the other hand, a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge is illegal as being against public policy; <sup>5</sup> likewise a wager as to the event of a cock-fight <sup>6</sup> or a dog-fight, <sup>7</sup> or whether a horse can trot eighteen miles within an hour. <sup>8</sup> Wagers such as the above were held to be illegal as tending to create disturbances and to encourage cruelty. <sup>9</sup> Those upon the result of any election are held to be void, both in England and this country, upon the ground that they are contrary to public policy and tend to impair the purity of elections. <sup>10</sup> But notwithstanding the rule upholding certain wagers, the English courts frequently reprehended such contracts and expressed their regret that they had ever been sanctioned. <sup>11</sup> Thus Ashhurst, J., <sup>12</sup> questioned whether it would not have been better for the public welfare if the courts had originally determined against all actions to enforce the

<sup>1</sup> *Morgan vs. Pebrer*, 4 Sco. 230.

<sup>2</sup> *Good vs. Elliott*, 3 T. R. 693.

<sup>3</sup> *Hussey vs. Crickitt*, 3 Campb. 168.

<sup>4</sup> *Jones vs. Randal*, Cowp. 37; and see generally, upon this subject, Lord Campbell in *Thackoorseydass vs. Dhondmull*, 6 Moo. P. C. 300; *Doolubdass vs. Ramlooll*, 3 Eng. L. & Eq. 39.

<sup>5</sup> *Evans vs. Jones*, 5 M. & W. 77.

<sup>6</sup> *Squires vs. Whisken*, 3 Campb. 140.

<sup>7</sup> *Egerton vs. Furzeman*, 1 C. & P. 613.

<sup>8</sup> *Brogden vs. Marriott*, 3 Bing. (N. C.) 88.

<sup>9</sup> *Id.*

<sup>10</sup> *Pars. on Cont.* (6th ed.) 755 n., and cases there collected.

<sup>11</sup> *Robinson vs. Mearns*, 16 E. C. L. R. 253; *Walpole vs. Saunders*, *id.* 276; *Gilbert vs. Sykes*, 16 East, 150; *Fisher vs. Waltham*, 4 Q. B. 889.

<sup>12</sup> *Atherford vs. Beard*, 2 T. R. 610.

payment of wagers; and Buller, J., in the same case, did not consider it to have ever been established as a position of law, that a wager between two persons not interested in the subject-matter was legal. This, however, was *obiter dictum*, and he proceeded to determine the wager by distinctions taken in former cases. And Lord Ellenborough<sup>1</sup> leans to the view of Buller, J.;<sup>2</sup> and Le Blanc, J., in the same case, uses the following language: "It has often been lamented that actions upon idle wagers should ever have been entertained in courts of justice. The practice seems to have prevailed before that full consideration of the subject which has been had in modern times."

The principle of the common-law upholding wagers was adopted in this country by the states of California,<sup>3</sup> Texas,<sup>4</sup> Illinois,<sup>5</sup> New Jersey,<sup>6</sup> and Delaware;<sup>7</sup> and the United States Court in *Grant vs. Hamilton*<sup>8</sup> held that a wager fairly made was recoverable at common-law. And the early tendency of the New York courts was to sustain wagers as valid within the rules of the common-law.<sup>9</sup>

(b.) *Wagers under Existing Laws.*

In England the strictures of the courts upon wagers led to the passage of a statute<sup>10</sup> in the year 1845, by section 18 of which it is provided that "all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any

<sup>1</sup> *Gilbert vs. Sykes*, 16 East, 159.

<sup>2</sup> *Atherford vs. Beard*, 2 T. R. 610.

<sup>3</sup> *Johnston vs. Russell*, 37 Cal. 670.

<sup>4</sup> *Wheeler vs. Friend*, 22 Tex. 683; *Monroe vs. Smelly*, 25 Tex. 586.

<sup>5</sup> *Smith vs. Smith*, 21 Ill. 244.

<sup>6</sup> *Trenton, etc., Ins. Co. vs. Johnson*, 4 Zab. (N. J.) 576.

<sup>7</sup> *Deweese vs. Miller*, 5 Harr. 347.

<sup>8</sup> *McLean* (7th Circ. Mich.), 100.

<sup>9</sup> *Bunn vs. Riker*, 4 Johns. 426; *Campbell vs. Richardson*, 10 id. 406.

<sup>10</sup> 8 and 9 Vict. c. 109.



wager, or which shall have been deposited in the hands of any person to abide the event on which such wager shall be made.”<sup>1</sup> By the Revised Statutes of New York,<sup>2</sup> “All wagers, bets, or stakes made to depend upon any race, or upon any gaming by lot or chance, casualty, or unknown or contingent event whatever, shall be unlawful. All contracts for or on account of any money or property or thing in action so wagered, bet, or staked shall be void.” Similar and often more stringent legislation exists in the majority of States of the Union.<sup>3</sup>

Without detailing further specific legislation on this subject, in conclusion it may be said that the general tendency of the courts of the various States is to consider all gaming and wagering contracts as utterly void; to look upon them as insidious enemies to our modern public policy and standard of

<sup>1</sup> For decisions under statute of Vict. consult *Higginson vs. Simpson*, L. R. 2 C. P. D. 76; *Beeston vs. Beeston*, L. R. 1 Ex. D. 13; *Inchbald vs. Cockerill*, 4 Jur. (n. s.) 693.

<sup>2</sup> 1 Rev. Stat. 661, § 8.

<sup>3</sup> Thus in Ohio it is enacted (Rev. Stat. 1880, § 6938); “Whoever plays at any game whatsoever for any sum of money or other property of any value, or makes any bet or wager for any sum of money or other property of any value, shall be fined not more than \$100, or imprisoned not more than six months nor less than ten days, or both.” See also *Lucas vs. Harper*, 24 Ohio St. 328. And Iowa (Stat. of Iowa, § 4028), Indiana (Revision of 1876, c. 125), West Virginia (Rev. Stat. ch. 47, § 1-9), and Wisconsin (Rev. Stat. ch. 185, § 4535) have similar statutes. In Pennsylvania no action can be maintained upon a wager of any kind (*Edgell vs. McLaughlin*, 6 Whart. 176, overruling *Morgan vs. Richards*, 1 Bro. 171). In the commonwealth of Massachusetts all wagers are de-

clared unlawful (*Love vs. Harvey*, 114 Mass. 80). Election bets are punished by fine in Kansas (Gen. Stat. 1868, ch. 31, art. 11, § 251). In Missouri (Rev. Stat. ch. 109, § 5728) money lost on wagers may be recovered if sued for within three months after the cause of action accrued. In New Hampshire (Gen. L. 1878, ch. 272, § 12) wagers are declared void. In Maine all wagers are held to be void (*Lewis vs. Littlefield*, 15 Me. 233). In Vermont no action will lie to recover property won of another by a bet or wager (*Collamer vs. Day*, 2 Vt. 144). See also dissenting opinion of Bennett, J., in the case of *The State vs. Croteau*, 23 Vt. 14; and in the case of *Rice vs. Gist*, Strobb. (S. C.) 82, Judge O’Neill, in delivering the opinion of the court, used the following emphatic language: “I am prepared hereafter to declare all wagers wrongful on their clear immoral tendency, and thus to sweep from our courts the whole body of wagers, great and small.”

morality, fostering unhealthy desires for sudden gain, destroying the spirit of patient labor, and presenting easy avenues to demoralizing habits of speculation—often to positive crime.

We shall now proceed to examine the cases under the statutes and principles governing “wagers” which have arisen out of transactions in securities and in “petroleum,” “cotton,” and “grain”—operations in the three last-mentioned kinds of merchandise being very similar to dealings in stocks—first setting forth those adjudications in which the defence of “wager” has been sustained; secondly, those in which it has been overruled; and, thirdly, deducing the results of the cases into general principles.

In the outset, the general proposition upon the subject of wagers may be stated as follows: If the agreement between the parties is a *bona fide* contract to buy and sell, the law will sustain it; but where it appears from the evidence that there is no real contract of sale, and that the whole arrangement is to be settled by the payment of “differences,” it will be set aside. This statement is conceded in all of the cases; and whatever inconsistency or want of harmony there may be in the decisions will be found to arise from the different interpretations the courts have placed upon the facts, and which can only be ascertained by a review of the adjudications.

### (c.) *Wagers between Principals.*

There is a marked distinction in those cases which have arisen between the *direct* parties to a contract—as, for instance, a vendor and a vendee—and those in which a Broker, acting for a principal, has entered into agreements with third persons in behalf of his principal, and then seeks indemnity from the latter for money laid out, etc., and commissions in such transactions. In the former class, if the intention of the parties is not to deliver or receive property, but to settle by the

mere payment of differences, the contract is a wager. But a Broker may be ignorant of the unlawful intention of his principals, and may then recover for money paid out, commissions, etc., although the principals would be unable to enforce the contract as between themselves.<sup>1</sup>

This important distinction will be found to be supported in all of the well-considered cases. Under this head, therefore, we shall set forth the cases arising between *principals* in stock transactions, remarking in the beginning that the cases seem to be few in which the defence of wager has been sustained.

The first case which arose under the act of Victoria was that of *Grizewood vs. Blane*.<sup>2</sup> The plaintiff, who was a Stock-jobber in London, brought an action of assumpsit against the defendant, who had, through his Broker, contracted to sell certain shares of stock, which he did not own, to the plaintiff, deliverable at a future time. The market in the meantime having advanced, the defendant could not deliver the stocks at the price the plaintiff had bargained to pay for them, whereupon it was agreed between the parties that, instead of delivering the stocks, the defendant should pay the differences between the contract and the market price on the day they were to be delivered. The action was upon this last agreement to recover the "differences." The defendant interposed the defence that the contract was illegal, as a wager on the price of the shares, setting forth in his plea the very language of the act. The court, upon special demurrer, gave judgment for the plaintiff, holding that the plea was bad, and that the defendant was bound to show the circumstances which made the contract set forth in the declaration a gaming one. The case subsequently came to trial on the issues of fact. The

<sup>1</sup> *Warren vs. Hewitt*, 45 Ga. 201, and cases cited under sub. (*d.*) p. 420.      <sup>2</sup> 20 Eng. L. & Eq. 290; for declaration in the case, see 8 id. 415; s. c. 11 C. B. 538.

court left it to the jury to say what was the intention of the parties at the time of making the contract, whether either party really meant to purchase or sell the shares in question ; that, if they did not, the contract was a gambling transaction and void. The jury found for the defendant. Upon appeal, this ruling was sustained, and the rule thus established of leaving the intention of the parties to be determined by the jury has, it seems, been substantially adhered to, except by the courts of Pennsylvania, to which allusion will hereafter be made.<sup>1</sup>

In the United States, beginning with the State of New York, we find a case<sup>2</sup> somewhat analogous to *Grizewood vs. Blane*, where a demurrer was interposed to the complaint, but with a different result from that reached in the English case. In that case the Superior Court of New York interpreted the statute upon the subject of wagers, and held that an answer to a complaint for damages for non-delivery of certain pork, which set up "that it was not the intention of the defendant to make any actual sale or delivery of pork to the plaintiff, nor was it the intention of the plaintiff actually to buy or receive any pork from the defendant; that it was the mutual design of both the plaintiff and defendant, at the making of the said supposed contracts, that the same should not be specifically performed in whole or in part ; but, on the contrary, that at the maturity of said supposed contracts, the differences between the then market value of the pork therein mentioned and the price of the same fixed in said supposed contracts should be paid by the one party to the other, as performance or satisfaction of said supposed contracts," was good. The court distinguished the case from *Grizewood vs. Blane* on the ground that the language of the New York statute was broader than the English act, but fully concurred

<sup>1</sup> See also s. c. 11 C. B. 526; *Marshall vs. Thruston*, 3 Lea (Tenn.), 743. <sup>2</sup> *Cassard vs. Hinmann*, 1 Bosw. (N. Y.); *aff'd* 14 How. (N. Y.) Pr. 84.

in the result of that case. There are other cases where the defence of wager has been sustained, especially in the State of Pennsylvania, but they more appropriately belong to the other subdivisions of this chapter.<sup>1</sup>

Beginning with England, we find that the decided tendency of the courts of that country has been to reject the defence of wager where it has been introduced to defeat a recovery in actions growing out of Stock Exchange transactions.

To illustrate this tendency, it is necessary to set forth but a few of the leading modern cases. In the following case, the court, under a defence of wager, examined dealings of members of the London Stock Exchange *inter se*, and pronounced them invulnerable under the statute of Victoria before cited. A, B, and C were members of the Stock Exchange, according to the rules and customs of which there are two days appointed in a month for settling transactions relating to foreign securities; and, in case of a loan upon or a sale of such securities, the lender or seller has the right, in case of non-payment of the loan or non-completion of the purchase, either to sell or take them at their market value—the deficiency, if any, in the price being paid to the borrower or purchaser, and the surplus, if any, beyond the loan or purchase-money being paid by him to the lender or seller, who, if the borrower or purchaser is declared a defaulter, is bound to take the securities at a price fixed by the official assignees of the association. According to these rules and customs, A lent to C money on the security of foreign railway shares, which were of the full value of the loan, and on each succeeding settling-day the amount of depreciation or increase in the value of the shares was paid by C or A respectively to the other, till C was declared a defaulter, when A took the shares at the price fixed

<sup>1</sup> See post, p. 423.

by the official assignee. C was afterwards adjudged a bankrupt, and A tendered a proof for the balance due him in respect of the transaction, after deducting the price at which he had taken the shares.

According to the same rules and customs, B agreed with C to sell him one hundred foreign railway shares for a certain sum. The transaction was not completed, but on each succeeding settling-day the differences were paid by B or C, as in A's case; and, on C being declared a defaulter, B likewise took the shares at their value, and, on C's bankruptcy, tendered a proof for the balance due to him in respect of the said shares. The proofs were both rejected on the ground that the transactions were illegal as wagers. On appeal, the Court of Appeals reversed this ruling, and held that the transactions were regular and legal. The court, in the opinion, laid stress upon the facts proved in each case—that the transactions had been conducted in accordance with the rules of the Stock Exchange; that there was an actual advance of money and a deposit of shares in the one case, and that in the other case the dividends on the shares alleged to have been sold were accounted for to the bankrupt.<sup>1</sup>

In the State of New York, the leading case upon the subject of wagers is *Bigelow vs. Benedict*,<sup>2</sup> where the instrument sued on was as follows:

“ATTICA, Jan. 23, 1865.

“Know all men by these presents, that I, C. B. Benedict, for and in consideration of the sum of \$250, do agree to receive from M. C. Bigelow, at any time within six months from date he may choose to deliver the same, \$2500 in gold coin of the United States, for which I agree to pay to the said B. 95 per cent. premium on the dollar, or at the rate of \$195 in good current funds for each and every \$100 of coin. The said B. does not con-

<sup>1</sup> In re Morgan, ex parte Phillips 634; 30 L. J. Bank. 1; 3 L. T. (n. s.) and ex parte Marnham, 6 Jur. (n. s.) 516.  
1273; 9 W. R. 131; 2 De G. F. & J.      <sup>2</sup> 70 N. Y. 202.

tract to deliver the coin, but pays the \$250 for the privilege of delivering or not, at his option. Signed, C. B. B."

The plaintiff Bigelow tendered the gold before the time mentioned in the contract had expired, brought suit and recovered judgment for the difference between the market value in current funds of gold coin at the time of tender and the price specified in the contract, with interest. The validity of the contract was assailed on the ground that it was a wager. The appellate court held that there was nothing illegal on the face of the contract; and as no evidence had been given showing former dealings between the parties, or any vicious intent, the judgment below was sustained. The court was of opinion that the circumstances relied on to show that the contract was a wager—viz., first, that it was a contract for the sale of gold; and, second, that it was optional on the part of the seller—did not authorize the inference that it was illegal. While the court admitted that, if the contract in question was a mere device to evade the statute, it would be illegal, the question was, did the contract on its face disclose an illegal transaction? The court concluded that it did not, and that the defence of illegality was not established, the burden of proof resting upon the defendant to establish the same.<sup>1</sup>

But in a recent case in the Supreme Court of Wisconsin,<sup>2</sup> it was decided that to "uphold a contract in writing for the sale and delivery of grain at a future day for a price certain, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction." The

<sup>1</sup> See also *Peabody vs. Speyers*, 56 N. Y. 230; *Cameron vs. Durkheim*, 55 id. 425; *Cook vs. Davis*, 53 id. 318; 43 id. 209; *Frebilcock vs. Wilson*, 12 Wall. (U. S.) 687; *McIlvaine vs. Eger-ton*, 2 Robt. (N. Y.) 422; *Stanton vs. Small*, 3 Sandf. 230; *Tyler vs. Bar-rows*, 6 Robt. 104.

<sup>2</sup> *Barnard vs. Brokhaus*, 3 Wisc. Leg. News, 338; decided July 7, 1881; opinion by Cole, C. J.

law upon this subject is clearly and well stated in *Kirkpatrick vs. Bonsall*,<sup>1</sup> and the views there expressed accord with common-sense and the ordinary course of business transactions. As was remarked by Agnew, J., in this case: "We must not confound gambling, whether it be in corporation stock or merchandise, with what is commonly called speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh—that is, speculate upon—the probabilities of the common market, and act upon this lookout into the future in their business transactions; and in this they often exhibit high mental grasp and great knowledge of business and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions, and buy or sell in a *bona fide* way. And the law does not condemn such transactions, providing the intention really is that the commodity shall be actually delivered and received when the time for delivery arrives. Consequently no legal objection exists to such time contracts, which are to be performed in the future by the actual delivery of the property by the vendor, and the receipt and payment of the price by the vendee, if the contract is in writing; and it is also true that a contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that at the time the contract was made the vendor has neither the goods in his possession nor has entered into an agreement to buy them. A party may go into the market and buy the goods which he has agreed to sell and deliver."

It has also been decided that a purchase of grain at a certain price per bushel, made in good faith, to be delivered in the next month, giving the seller until the last day of the

<sup>1</sup> 72 Pa. St. 155; *Rumsey vs. Berry*, 65 Me. 570; *Gregory vs. Wendell*, 39 Mich. 337.



month, at his option, in which to deliver, is not an illegal or gambling contract, and that the purchaser would be entitled to its benefit, no matter what may have been the secret intention of the seller.<sup>1</sup>

An interesting question arising on contracts for the sale of grain, settled by payment of differences, was passed on by Judge Gresham in the United States Circuit Court for Indiana. It had already been well settled in previous cases that a contract, which on its face does not show an intention not to deliver, is presumed to have been an actual purchase or sale, and, though optional, is valid until the party impeaching the contract shows an illegal intent. The question as to what evidence will show the intent, and particularly whether the fact that the contract was actually settled by adjustment of differences, or that there was a usage to do so, necessarily shows it to have been illegal, or suffices to raise a legal presumption that the intent to make such a settlement existed in the inception of the contract, arose in the case before Judge Gresham, and he ruled that such a usage did not necessarily make the contract void.

The testimony tended to show that a general custom obtained among grain commission-merchants in Baltimore to the following effect: When one commission-merchant, upon the order of a Client, sells to another commission-merchant a quantity of grain for future delivery, and where it occurs that at some other time before the maturity of the contract the same commission-merchant receives an order from another Client to purchase the same or a larger quantity of the same kind of grain, for the same future delivery, and he executes this second order by making the purchase from the same commission-merchant to whom he had made the sale in the other case—then in such case the two commission-merchants

<sup>1</sup> Pixley vs. Boynton, 79 Ill. 351.

meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts, and restoring any margins that may have been put up; and from that time forth the first commission-merchant holds, for the benefit of the Client for whom he sold, the order or contract of the purchaser for whom he bought, so that the wheat of the selling Client may, when delivered, be turned in on the order or contract of the purchasing Client, and the commission-merchant is held responsible as guaranty to his Client. The evidence also tended to show a custom obtaining among commission-merchants in Baltimore, to the further effect that though the second transaction may have been had with a different commission-merchant from the one with whom the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another who owes like wheat for like delivery to the first commission-merchant, then in such case they settle by what they call "a ring"—that is, they all reciprocally surrender or cancel their contracts, adjust the price differences between themselves, and surrender all margins that had been put up; that in all such cases the commission-merchant substitutes the contract of another Client in place of that with the commission-merchant whose contract has been cancelled or surrendered, and that he guarantees to his Client the performance of the contract originally made on his behalf. The judge instructed the jury that these customs were founded in commercial convenience; that they are not in contravention of the law; and that they were valid. He also charged them that the burden of showing that the parties were carrying on a wagering business, and were not engaged in legitimate trade or speculation, rests upon the defendant.

On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling. A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further, and show that this understanding was mutual—that both parties so understood the transaction.<sup>1</sup>

In Pennsylvania the following contract was sustained: “November 10, 1870. In consideration of \$1000 we agree to deliver B., should he call for it during the first six months of 1871, 5000 barrels of oil. If said oil is called for, this call becomes a contract; ten days’ notice shall be given; and B. agrees to receive and pay for the same, cash on delivery, at 10½ cents a gallon.” This contract was attacked as a gambling transaction; but the court, upon reasoning similar to that used by the courts of New York in *Bigelow vs. Benedict*,<sup>2</sup> held that this did not appear from the face of the instrument; but that it was for the jury to say whether, in view of all the facts, it was a mere scheme to gamble upon the chance of prices.<sup>3</sup> In fine, in the language of Lord Coke, “It is a general rule that whensoever the words of a deed, or of the parties without deed, may leave a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with the law shall be taken.”<sup>4</sup>

<sup>1</sup> *Williar vs. Irwin*, 12 Chic. Leg. News, 241; see also, in this connection, *Gregory vs. Wendell*, 40 Mich. 432.

<sup>2</sup> *Ante*, p. 414.

<sup>3</sup> *Kirkpatrick vs. Bonsall*, 72 Pa. St. 155.

<sup>4</sup> *Co. Lit.* 42, 188; but compare matter of *Chandler*, 13 Am. Law Reg. (n. s.) 310.

*(d.) Actions by Brokers for Money Laid Out, etc., and Commissions in Stock Transactions.*

We propose to consider separately those cases in which the defence of "wager" has been set up in actions brought by Stock-brokers to recover for money laid out in stock transactions at the request and for the use of the Client, together with commissions due him for services in such dealings, again calling attention to the distinction drawn by the decisions between this class of cases and those in which the contest is between the direct parties to the contract.

In the outset it will be noticed that the statute of Victoria does not render wagering contracts themselves "illegal," but declares that they shall be "null and void," and that no suit shall be maintained upon them. In this respect it differs from the Stock-jobbing Act of Sir John Barnard, by which similar contracts were prohibited under a penalty. Accordingly, no claim arising out of such contracts could be enforced at law because of its illegality. The distinction between the two acts is forcibly illustrated in actions by Brokers for commissions. As we have seen under "Sir John Barnard's Act," a Broker could not recover as against his principal for commissions, or for money laid out for him, in transactions in the nature of gaming, because the Broker could not establish his rights except by showing that he had done something forbidden under a penalty, and consequently illegal.<sup>1</sup> Yet, under the act of 8 and 9 Victoria, the contracts being voidable only,<sup>2</sup> a Broker can recover,<sup>3</sup> even if he knew that the contract

<sup>1</sup> Ante, pp. 254, 388; see also Wells vs. Porter, 2 Bing. (N. C.) 722.

<sup>2</sup> Higginson vs. Simpson, L. R. 2 C. P. D. 76.

<sup>3</sup> See cases heretofore cited at pp. 254, 388, ante; also Jessopp vs. Lut-

wyche, 10 Ex. 614; Knight vs. Cambers, 15 C. B. 562; Knight vs. Fitch, id. 566; 3 C. L. R. 567; 1 Jur. (n. s.) 526; 24 L. J. C. P. 122; Bubb vs. Yelverton, 24 L. T. (n. s.) 822.

entered into was void under the statute;<sup>1</sup> for if one person requests another to pay any loss that may occur in such a transaction, there is a continuing request to pay until revoked.<sup>2</sup> In fine, the law as to gaming contracts is, that all such contracts are simply null and void. They are not, therefore, illegal, and the parties making them are not liable to any actions or penalties.

These distinctions were very forcibly noticed in *Rosewarne vs. Billing*, where all of the decisions were referred to. In that case, Erle, C. J., said: "I am clearly of opinion that if a man loses a wager, and gets another to pay the money for him, an action lies for the recovery of the money so paid."<sup>3</sup> And the court held that the fact that the Broker made the contracts for the payment of differences in his own name, according to the usage of Brokers, but for the account of his principal, made no difference in the result. Of course, these views are subject to modification and change where the language of a statute is not in substantial accord with that of Victoria, heretofore cited; for such terms may undoubtedly be used by the legislature as would prevent any recovery upon wagering contracts either directly or indirectly.

In the case of *Cooper vs. Neil*,<sup>4</sup> it appeared that the defendant employed one B., a Broker, to enter into contracts upon the Stock Exchange for the purchase of shares. B. knew the defendant did not intend to accept the shares, but only to receive or pay "differences" according to the rise or fall in the market price of the shares. B. entered into contracts with Jobbers for the purchase of shares, in pursuance of the defendant's instructions, and, according to the rules of the Stock

<sup>1</sup> *Rosewarne vs. Billing*, 15 C. B. vs. Beeston, L. R. 1 Ex. Div. 13; Ex (n. s.) 316. parte Pyke, in re Luster, L. R. 8 Ch.

<sup>2</sup> *Id.* See also *Oldham vs. Ramsden*, 44 L. J. C. P. 309; *Bubb vs. Yelverton*, 24 L. T. 822; *Higginson vs. Simpson*, L. R. 2 C. P. D. 76; *Beeston*

Div. 754. <sup>3</sup> But see *Hare, P. J.*, contra, in *Fareria vs. Gabell*, 89 Pa. St. 89.

<sup>4</sup> 13 Week. Notes, 123.

Exchange, became personally liable on the contracts. He was afterwards declared insolvent, and the plaintiff, as his trustee, sued upon an implied contract of indemnity against the claims of the Jobbers. At the trial, the jury found that the contracts with the Jobbers were mere time bargains, and judgment was given for the defendant. The court, upon appeal, however, held that the verdict was unsatisfactory, and a new trial was directed; and, in giving its opinion, the court foreshadowed the result reached in *Thacker vs. Hardy*,<sup>1</sup> by laying down the proposition that if the defendant employed B. to make contracts upon the Stock Exchange with the Jobbers, according to the rules of the latter body, and therefore contracts that were real so far as the Jobbers were concerned, but that B. undertook with the defendant that he would so manage, or endeavor to manage, the contracts with the Jobbers that the defendant would never be called upon to pay or receive more than differences if B. succeeded, the implication was that there was an implied contract that if B. incurred liabilities without his own fault the defendant would indemnify him.<sup>2</sup>

But where the agreement was that the Broker should, at the Client's direction, buy shares and sell them, the profits to belong to the Client—the Broker being *personally liable to him for these profits*—and the losses to be borne by the Client, the Broker personally, and not by way of indemnity, receiving those losses—held, a wagering contract within the statute.<sup>3</sup> The fact that the Brokers are in either case to receive their commissions and charges does not alter the result.<sup>4</sup>

The court, however, laid stress upon the want of averment

<sup>1</sup> Post.

<sup>2</sup> See also, as explaining and distinguishing this case, *Thacker vs. Hardy*, L. R. 4 Q. B. D. 685; and see also *Lyne vs. Siesfield*, 1 H. & N. 278.

<sup>3</sup> *Byers vs. Beattie*, 16 W. R. 279; 2 Ir. R. C. L. 220.

<sup>4</sup> Id. It was also held that this invalidity might be taken advantage of by demurrer without any special plea.

by the Brokers that the latter, in making for the defendant a contract of purchase and sale, contracted any liabilities themselves to the vendor and vendee, or that they paid any money to the vendor or received any money from the vendee.

So in *Re Green*,<sup>1</sup> it was held that "contracts of sale which do not contemplate the actual *bona fide* delivery of the property by the seller, nor payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are void under the Wisconsin statute against gaming contracts." And this rule was applied to a Broker who had advanced the differences on such a contract for a bankrupt. It was decided he could not prove his claim for the amount so advanced. In that case the court, in rendering its opinion, said: "But, plain as it appears, the case of *Rosewarne vs. Billing*, cited by the claimant's counsel, seems to sanction a different doctrine. But I do not think that case can be regarded as the law upon this point in England. There are cases in conflict with it, so I think it may be safely asserted that the weight of English authorities is with *Steers vs. Lashley*."<sup>2</sup>

But, as we shall see, the case of *Rosewarne vs. Billing* has been recently and directly endorsed by the English courts.

Pennsylvania presents a number of decisions in which the defence of "wager" was interposed to actions by Stock-brokers, and, in its latest opinions, the highest tribunal in that State has laid down the doctrine in favor of sustaining the defence, with such manifest rigidity and so inconsistently with the leading decisions of England and the States of the Union as to draw forth sharp criticisms both from the bench and the bar of its own State.<sup>3</sup> An analysis of the cases, we think, fully

<sup>1</sup> 15 Nat. Bank. Reg. 198.

<sup>2</sup> 6 Term R. 61.

<sup>3</sup> See article of Mr. Justice Briggs, 38 Leg. Int. (Pa.) 116; Lewis on

Stocks, etc. 109, where it is said, "The law in Pennsylvania upon this question is unique, and opposed to all authorities."

sustains these criticisms, and the present condition of the law of the State makes the business of buying and selling stocks so hazardous, both to the Broker and Client, as to call for an immediate change in the law, if the occupation of a Stock-broker is to be regarded as entitled to any legal protection whatever.

The first case which we deem it necessary to notice is Brua's Appeal.<sup>1</sup> In that case one K. made a contract in writing with one H., as follows: "I have this day sold and agreed to deliver to J. S. H., or to his order, twenty-five days from this date, two hundred shares Harlem Railroad common stock, at the rate of sixty dollars per share;" and at the same time delivered his promissory note for \$1000, as margin on the contract, it being a "short sale;" and subsequently, as the stock rose in price, delivered to H. other notes as additional margin. K. having made an assignment, these notes were proved as claims against his estate, and were allowed by the auditors. Upon appeal, the Supreme Court reversed this judgment, upon the ground that as the auditors had found as a fact that "the notes were a component part of a stock-gambling transaction, in which K., in effect, betted that in twenty-five days Harlem stock would sell at less than \$60," such finding was conclusive upon the court, and it necessarily followed that, being a "gambling contract, it could not be enforced; and that the holder of the promissory notes, having known this, and having taken them after they were due, it was established that there was no legal consideration for them, and that the holder was not in a position to escape the taint that renders them worthless." This is the whole of that case, and it will be observed that it was not one which occurred through the instrumentality of Stock-brokers, but was a transaction between *the parties themselves*; and the appellate court found,

<sup>1</sup> 55 Pa. St. 294.



in addition to the facts stated, that "the actual transfer of stock between these parties was not contemplated by them."

The court did not decide that "short sales" were illegal, but it used this language: "It is said the form in which this contract appears enters largely into the business of stock-brokerage. *This is a mistake*; the *bona fide* purchase of stocks, no doubt, can be conducted in a legitimate way, and is so, generally, without treading in the least on the gambler's province."

In fact, in the next case upon the subject which is reported in that State, *Smith vs. Bouvier*,<sup>1</sup> a "short sale" was distinctly upheld. In that case one K., not owning stock, employed Brokers to sell stock for him at a named price, to be delivered on a particular day. The Brokers sold as ordered, and, as is customary, borrowed the stocks for delivery; the stock appreciating in price, the Brokers bought the same "in," and commenced an action for money laid out and expended. The main contention in the case was whether or not the transaction was a gambling one, and would for that reason prevent the Brokers recovering money advanced and commissions earned. The court below submitted to the jury the question, whether the transaction was one in which the parties agreed that mere differences were to be paid, or a real transaction; and the jury found for the plaintiff.

Upon appeal, the defendant contended "that the jury should have been instructed that all purchases of stocks, with a view to resell and make profit on their rise, or contracts to furnish stocks on time, should be declared gambling transactions and illegal, not only between buyer and seller, but as to Brokers and agents through whom the sales or purchases had been made." Commenting upon this argument, the learned court said: "This would make a great inroad into what has,

<sup>1</sup> 70 Pa. St. 325.

for an indefinite period, been regarded as a legitimate business, and would either destroy it altogether, or, if continued, put the Brokers at the mercy of those for whom they transact such business. Let it be understood that a Broker has no power to recover either for advances or commissions, however honestly he may have dealt, and there will be found enough persons whose easy consciences would throw their losses upon the shoulders of those who advanced the money and earned commissions in their service. It would be a very palpable wrong to the Brokers, who are licensed to do such business, if such were held to be the law. To this extent Brua's Appeal<sup>1</sup> never was intended to go." In conclusion, the court said: "Whether the transactions embraced in this case were *bona fide*, or were merely in a form to cover gambling transactions, after a full explanation, was left to the jury."

It will be observed that the above was a clear case of speculating on "margins," which the courts, in the opinions hereafter referred to, regarded as so obnoxious; and that upon a "margin" capital of \$10,000 the Client sold 2000 shares of stock "short," of the market value of \$334,000.

Then follows the case of *Maxton vs. Gheen*.<sup>2</sup> That was an action of assumpsit, brought by Stock-brokers against their Client, to recover a balance of account arising from transactions in stocks. The defence was, that the indebtedness arose out of gambling in stocks. It appeared that the transactions were "short" sales of stock; but the Brokers, in the first instance, had no knowledge that the defendant did not have the stock, although after the second sale they knew he was selling "short." It also distinctly appeared that the stocks were sold for account of defendant on "margin;" the Brokers testifying "that when they sold stock short they required from two to ten dollars per share as margin, unless the party left

<sup>1</sup> Aute, p. 424.

<sup>2</sup> 75 Pa. St. 166.

the stock with them." The plaintiffs had a verdict, which was affirmed by the appellate court, Agnew, C. J., delivering the opinion, and holding that the facts did not disclose "a transaction in stocks by way of margin, settlement of differences, and payment of the gain or loss, without any intention to deliver the stocks."

The next case to which we will refer is *Fareira vs. Gabell*.<sup>1</sup> That was an action on certain promissory notes made to plaintiff, a Stock-broker, some of the notes being given as "margins on stock contracts," and the others for an indebtedness arising out of losses in stock transactions. The defence was that the transactions were "wagers." The facts of this case are very meagrely reported; but it seems that the defendant proved that the contracts made through the agency of plaintiff were simply wagering contracts. The learned trial judge very fairly submitted the question to the jury, whether the transactions were gambling ones; but he illustrated the general rule of the law by stating a supposititious case between *two persons dealing directly together in wheat*, without any intention, on the one hand, to deliver, or, on the other hand, to receive. But that illustration is entirely ineffective in presenting a contract in which a Stock-broker, *acting for a commission*, makes transactions for his Client upon a Stock Exchange with *third persons*, actually advancing money, and actually receiving, in some form, the securities. However, the question of wager or no wager was submitted to the jury, and a verdict was found for the defendant. Upon appeal to the Supreme Court, this conclusion was affirmed without any opinion, the court merely referring to *Brua's Appeal* and *Smith vs. Bouvier* as entirely sustaining the judge's charge.

As we have said, the facts of this case are reported so sparsely as to deprive us of the power of criticising the re-

<sup>1</sup> 89 Pa. St. 89.

sults reached by the jury; but as the case stands, in view of the fact that the question was fairly submitted to the jury, their decision would seem to be conclusive. But the next case—*North vs. Philipps*<sup>1</sup>—which is reported in the same book as the preceding case and was decided at the same term, is utterly irreconcilable with the previous decisions of the courts of that State. In that case the defendants, Stock-brokers, purchased certain stock for account of the plaintiff on “margin,” the contract being that plaintiff should constantly keep with the Brokers ten per cent. of the par value of the stock. The stock declining, defendants requested additional margins, and upon failure to accede to the demand the stocks were sold. The plaintiff thereupon brought an action of assumpsit against the Brokers to recover damages, upon the erroneous theory that there had been a purchase and sale of the stock between the *plaintiff and defendants*; and recovered a verdict based upon the difference between the value of the stock on the day it was sold, and the highest value it had reached down to the day of the trial. Upon appeal to the Supreme Court, the doctrine of the court below upon the question of damage was repudiated; and the appellate court did not notice the *form of the action*, but (through Mr. Justice Gordon) mainly occupied itself in examining the character of the contract between the parties, and adjudged it to be a mere gambling transaction. The court held that the stock, although *purchased* by the Brokers at the request and for the account of the Client, was not his property, but that it belonged to the Brokers; and in face of the fact that the plaintiff had testified that he expected to pay for the same and take it up, and ignoring the powerful circumstance that the jury had passed upon the transaction and decided in favor of its validity—the reasoning of the learned court being that the dispari-

<sup>1</sup> 89 Pa. St. 250.

ty between the Client's wealth and the amount of the purchase-money required to purchase the stock proved conclusively that the contract was a mere gambling device. The learned court paid no attention whatever to the finding of the jury. We shall reserve our criticism upon this case until we have examined the other cases, merely observing that the form of the action would have more properly been *ex delicto* in trover for the conversion of the Client's stocks by an untimely and illegal sale of the same by the Broker.

In *Gheen vs. Morgan*<sup>1</sup> the court, through the same learned judge, went out of its way to assert the same doctrine as that contained in the preceding case, and was only prevented from applying it by the fact that the record did not raise the legality of the contracts. But the principle established in *Fareira vs. Gabell* was most vigorously upturned in the subsequent cases of *Ruchizky vs. De Haven*<sup>2</sup> and *Smith vs. Thomas*.<sup>3</sup> In *Ruchizky vs. De Haven* the court held that money received by a Stock-broker from a minor to carry on transactions in stocks may be recovered back from the Broker, such a contract being void *ab initio*. In reversing the opinion of the court below,<sup>4</sup> Mr. Justice Gordon said: "When under the case stated the court below assumed that the defendant must be regarded as the agents of R. [the infant], . . . it committed an error. The parties were not dealing in stocks, but in margins, and R. knew no principals but De H. and T. [the Brokers]." The court concluded that the contracts fell under the ban of a gambling transaction; and that the Client, being an infant, could recover the money and securities deposited with the Brokers as margin, although the Brokers had no knowledge that he was not *sui juris*. The court, in its opinion, animadverted most severely, but without

<sup>1</sup> 89 Pa. St. 38.

<sup>2</sup> *Id.*

<sup>3</sup> Per Mitchell, J., 36 Leg. Int. (Pa.)

<sup>4</sup> 38 Leg. Int. 115.

174.

the slightest foundation in fact, upon the conduct of the Brokers. In speaking of their want of knowledge of the infancy of their Client, the following language was used: "Moreover, they did not know because they did not choose to inquire. They were getting his money; and like all other persons engaged in unlawful callings, they cared not whether that money came from man, woman, or child—whether their victim was young or old, sane or insane. . . . We repeat, therefore, there is nothing to be returned to the defendant. They lost nothing in this transaction, and hence can the more easily return to the plaintiff's estate that which belongs to it."

Then follows the latest case upon the subject—*Smith vs. Thomas*<sup>1</sup>—in which the court took occasion to review the subject anew and to reiterate most emphatically its former decisions. In that case the action was *assumpsit*, and was brought by a Stock-broker against his Client to recover a balance due on certain stock transactions. Upon the trial the plaintiff had judgment; but on appeal this was reversed, the opinion being again delivered by Mr. Justice Gordon. That learned judge's statement of the facts is as follows: "Thomas [the Broker] swears that he sold for Dickson 500 shares of Pennsylvania Railroad stock short; and so Thomas further on explains by saying that at the time he professed to sell this stock he had no such stock in his hands to sell. Nevertheless, he says, when he sold these 500 shares he delivered them. This anomalous kind of testimony he explains by saying that this delivery was made on the clearing-house sheet, which means a mere settlement of differences. It appears also from this same testimony that, in order properly to keep up appearances when the time came for delivery, he had to borrow 500 shares of stock from somebody, whose name does not appear,

<sup>1</sup> 38 Leg. Int. 115.

and of those there was no actual delivery, but, as the witness says, it came through the clearing-house sheet. All this means, in common parlance, that Thomas sold for Dickson 500 shares of stock, which Dickson at that time neither had nor intended to have, and that, under the pretence of meeting this contract when it fell due, Thomas pretended to borrow 500 shares, which were not delivered to him; that this altogether fictitious transaction was accomplished through the agency of the clearing-house, and was one in which no other parties were known but Thomas and Dickson, who were to account to each other for differences only." And upon this remarkably erroneous statement the learned judge predicated the result reached, that "confessedly, then, this was a dealing in differences or margins—a wagering contract—and therefore utterly void;" and that there was no question as to a *bona fide* contract upon which the jury was to pass.

The above represent the leading decisions of the Supreme Court of Pennsylvania upon this subject of wager in respect to stock transactions; and it is difficult to conceive how a court whose decisions are received with such universal homage could have gone so far astray upon a subject which vitally affects one of the most important moneyed interests of that State.

*First.* The decisions of the court are in hostility to each other. In *Smith vs. Bouvier*<sup>1</sup> the facts were precisely similar to those of *Smith vs. Thomas*. They both represented "short" transactions in stocks upon a margin. In *Smith vs. Bouvier* the jury found for the Broker and the verdict was sustained; but in *Smith vs. Thomas* a similar verdict was reversed, the court arbitrarily setting aside the conclusion of the jury. The element of the clearing-house which appeared in *Smith vs. Thomas* can make no difference between the cases,

<sup>1</sup> 70 Pa. St. 325.

because that system, as all familiar with its workings know, was created to facilitate the business; and, indeed, the fact of stocks being "cleared," if it shows anything, proves that the transactions were real. It is utterly impossible to reconcile the two cases, and yet *Smith vs. Bouvier* was cited with approval in *Smith vs. Thomas*. It is equally impossible to harmonize the last-named adjudication with the case of *Maxton vs. Gheen*,<sup>1</sup> where the Client was selling stock "short" on margins, and where a verdict for the Broker was sustained. Although the Broker swore that at first he did not know that his Client was selling "short," yet he admitted that after the second transaction he acquired that knowledge; and it is perfectly manifest, from reading the case, that it was an every-day speculation on margin. *North vs. Philipps*<sup>2</sup> and *Ruchizky vs. De Haven*<sup>3</sup> are illustrations of "long" transactions—that is, *purchases* of stocks for Clients on margin. The facts involved were in no sense different from those presented in the case of *Wynkoop vs. Seal*,<sup>4</sup> where stocks were purchased on a margin; and it did not occur either to the counsel or court, in the last-mentioned case, to suggest that the transaction was void as a "wager."

*Second.* The fundamental error into which the Pennsylvania court has fallen arises from the fact that the decisions have proceeded upon the assumption that the dealings were merely between the *Broker* and *his Client*, without the intervention of any third persons; in fine, of treating a transaction in stocks conducted through the medium of the Stock Exchange as one in effect between a vendor and vendee, bargaining for mere differences. This is very far from the fact. In the third chapter of this book, the details of a speculative transaction in stocks is fully set forth, and it is not necessary to repeat the

<sup>1</sup> 75 Pa. St. 166.

<sup>2</sup> 89 Pa. St. 250. See ante, p. 428.

<sup>3</sup> 38 Leg. Int. 115. See ante, p. 429.

<sup>4</sup> 64 Pa. St. 361.



same here ;<sup>1</sup> but the court does a manifest injustice to the Stock-broker when it treats him as one *deriving benefit from his Client's losses*. This, with great respect, is as absurd as it is unfair. The Broker has no interest in the business except to the extent of his commissions, when he makes actual sales or purchases with third persons on account of his Client, which was clearly shown in the cases in question. The version of the transaction given by Mr. Justice Gordon is that of a sharper fleecing his innocent victim ; and in that case, upon such erroneous premises, the Broker was compelled to lose a considerable sum of money, which he proved he had actually paid out for his Clients.

The character of the business is shown by a simple illustration. A orders B, a Stock-broker, to purchase 100 shares of a certain stock at par, and deposits with him \$1000. The Broker, in consideration of the commission and of receiving interest for his money, or for such other consideration as may enter into the arrangement, thereupon purchases at the Stock Exchange from C, a fellow-Broker, the stock, which is duly delivered to B, and the sum of \$10,000 paid to C. B advances the difference between the amount he receives from his Client and the purchase-money from his own funds, and holds the stock as security. Thereupon the stock becomes the property of the Client ; he receives the dividends, pays the calls ; it passes to his assignee in bankruptcy, should he become bankrupt ; and, in fine, all of the attributes of ownership attach to the Client.<sup>2</sup> We find here, then, an actual purchase and delivery of stock. This is the view of the transaction presented in *Wynkoop vs. Seal*.<sup>3</sup> Hare, P. J., in *Fareira vs. Gabell*,<sup>4</sup> defines a wager to be "a contract in which

<sup>1</sup> Ch. III. p. 103.

<sup>3</sup> 64 Pa. St. 361.

<sup>2</sup> See also Ch. III. p. 104, where the transaction is further illustrated.

<sup>4</sup> 89 Pa. St. 89.

the parties stipulate that they shall gain or lose upon the happening of an uncertain event, in which they have no interest except that arising from the possibility of such gain or loss." But it is perfectly apparent that the transaction which we have set forth is not embraced within this definition. It might apply as between A, the vendor, and C, the vendee; but as between A, the vendor, and B, his Broker, there is clearly no bet or wager, B's interest in the transaction being merely to the extent of his commissions. Nor does the Broker act as the Client's agent in gambling sales and purchases of stocks. The Broker, in pursuance of his Client's directions, makes *actual* bargains enforceable in the courts and in the forum of the Stock Exchange, and whose non-fulfilment renders him liable to heavy damages. In fine, the doctrine of wager must be confined to the actual parties concerned, and cannot reasonably be extended to defeat the right of a Broker to recover moneys paid out for his Client in *real* transactions with *third* persons. These views are forcibly illustrated in the recent case of *Thacker vs. Hardy*,<sup>1</sup> which should be consulted in this connection.

*Third.* But, in any event, the question as to whether a particular transaction constitutes a wager is one for the jury; and this well-settled rule, although laid down in *Smith vs. Bouvier*,<sup>2</sup> has been ruthlessly violated by the Pennsylvania courts in the cases referred to.<sup>3</sup>

The case in which the dealings of the Stock Exchange were examined most thoroughly in its relation to the act concerning wagers is the recent one of *Thacker vs. Hardy*.<sup>4</sup> This action was brought by a Broker against his principal for indemnity against liabilities incurred by the former in buying and

<sup>1</sup> 27 W. R. 158.

<sup>2</sup> 70 Pa. St. 325.

<sup>3</sup> See also *Kirkpatrick vs. Bonsall*,

72 Pa. St. 155; *Bigelow vs. Benedict*,

70 N. Y. 202.

<sup>4</sup> L. R. 4 Q. B. D. 635.

selling stocks and shares upon the London Stock Exchange by his authority. It appeared that the defendant was a speculator, and known as such to plaintiff; and that he (defendant) knew that, in order to carry out the transactions which he had employed plaintiff to make, the latter would have to enter into contracts to sell or buy respectively, and that there was no other way in which to speculate for defendant; that the plaintiff did buy and sell as per order; and defendant never expected, nor intended to accept, actual delivery of what plaintiff might buy for him, nor actually deliver what he might sell. For losses incurred by such speculations and commissions the suit was instituted by the Broker. The main defence was that the claim was founded upon gaming and wagering transactions.<sup>1</sup> The court, per Lindley, J., in delivering the opinion, said: "The agreement between the plaintiff and the defendant rendered it necessary that the plaintiff should himself, as principal, enter into real contracts of purchase and sale with Jobbers, and the plaintiff accordingly did so; and in respect of these contracts he incurred obligations, for the non-performance of which actions could, and can now, be brought against him. . . . What the plaintiff was employed to do was to buy and sell on the Stock Exchange, and this he did; and everything he did was perfectly legal, unless it was rendered illegal as between the defendant and himself by reason of the illegality of the object they had in view, or of the transactions in which they were engaged. . . . In answer to the argument that a contract which is void and unenforceable cannot be made the foundation of an implied promise to indemnify, it appears to me sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability; and that, in my view of the evidence, the defendant

<sup>1</sup> 8 and 9 Vict. c. 109, § 18.

did authorize the plaintiff to incur liability by buying and selling as above described." Upon appeal these views were fully endorsed by the judges composing the Court of Appeals, and a judgment for the plaintiff affirmed.<sup>1</sup>

The case of *Thacker vs. Hardy* was subsequently used by the court to sustain its decision in the late case of *Ex parte Rogers*,<sup>2</sup> where it was held that where a person has instructed a Broker to speculate for him at the Stock Exchange, by buying and selling stocks for him, with the intention that he should only receive or pay "differences," and authorized the Broker to pay any losses for him, the Broker is entitled to recover any sums which he has so paid for the Client, even though he has not entered into separate contracts on his behalf, but has appropriated to him parts of larger amounts of stock which the Broker has bought as a principal with the view of dividing them among different Clients, for whom he has been instructed to buy. So where the petitioner, a Stock-broker, applied under the Bankruptcy Act to have respondent, who was not a member of the Stock Exchange, adjudicated a bankrupt—the debt arising from transactions which the respondent had authorized the petitioner to make upon the Stock Exchange—and the petition was resisted on the ground that the debt was a gaming one under the statute of Victoria, it was held that the petitioner was merely an agent; and since the respondent must be taken to have known that by the rules of the Stock Exchange the petitioner was bound to pay to members of the Stock Exchange any sums of money which might be due from the respondent to them in regard to the transactions, a request to pay such sums must be implied.<sup>3</sup>

<sup>1</sup> See also *Rosewarne vs. Billing*, 15 C. B. (n. s.) 316; *Knight vs. Cambers*, 15 C. B. 562; *Knight vs. Fitch*, id. 566.

<sup>2</sup> L. R. 15 Ch. D. 207.

<sup>3</sup> *Ex parte Godefroi*, In re Hart, Week. Notes, 95 (1870). So in the case of *Marten vs. Gibbon* (33 L. T. (n. s.) 561) the court held that sales of prospective dividends are not con-

Although the soundness of the decision in *Thacker vs. Hardy* has been extrajudicially questioned upon the ground that all of the ordinary transactions between Client and Broker fall within the Gambling Act,<sup>1</sup> it is submitted that an analysis of such transactions shows that they are perfectly legal.

*First.* There is no agreement that mere differences shall be paid *per se* without anything further being done; but the transaction is begun by an order from the Client to buy or sell shares or stock, at a fixed or market price.

*Second.* The Broker is employed *as such*. He is not a party to the arrangement; neither the profit nor the loss of the transaction is his. The Broker's only interest in the matter is to the extent of his commission.

*Third.* That the transaction thus made is in law a real one fully appears from the note of the contract given by the Broker to his Client. This may contain the name of the purchasing or selling Jobber—sometimes it does, generally it does not; but it conclusively shows that the Broker has made an operation for the principal with a *third* person. From this contract so made by the Broker with the Jobber there are evolved legal liabilities. We may mention two of them: 1st. If the Jobber should refuse to execute the contract and to deliver the securities, the Client would have a cause of action against him.<sup>2</sup> 2d. But the Client would not have any cause

trary to law. There is no ground known to the law of England against a person possessed of property in railway shares selling the dividends to arise therefrom, even though the amount be unascertained. Such a transaction is not contrary to the statute in relation to "wagers," any more than a contract to pay for all the oil in a whaling-ship, although it is impossible to tell how many

whales the ship may bring back (per *Blackburn, J.*). See also two spirited articles on Option Contracts, 10 *Cent. L. J.* 221, 241.

<sup>1</sup> See 5 *Law Mag. and Rev.* (4th Series), 401, entitled "The Legal Relations between a Stock-broker and his Customer," by Messrs. Piggott & Whinney, Barristers.

<sup>2</sup> See cases cited in *Ch. V.*

of action against his own Broker for any neglect or refusal of the Jobber. Why? Because the Broker, having transacted the business of his employment in accordance with his instructions, is, upon familiar principles, not liable.<sup>1</sup>

*Fourth.* The fact that the Broker may enter into a contract or contracts for more than the specific amount of stock ordered to be bought or sold by one Client does not alter the legal status of the parties. If the Broker act in good faith to his Client, he is not debarred from transacting similar business for other Clients. Nor does the fact of the establishment of a clearing-house, and the system of tickets, enabling him to balance his business at one time, militate against the legality of these stock transactions. All of these things are mere auxiliaries to the Broker's business, calculated to enlarge its volume, and to enable him to despatch it with greater ease and promptness.

Although it was found as a fact, in *Thacker vs. Hardy*, that the Client never expected nor intended to accept actual delivery of what the Broker might buy for him, nor actually deliver what he might sell for him, and that the Broker knew this, yet it was also found that the Client, nevertheless, knew he incurred the risk of having to accept or deliver, but was content to run that risk in the expectation and hope that the Broker would be able so to arrange matters as to render nothing but differences actually payable to or by him, as the case might be. Nor is the fact that the Broker may himself speculate of any relevancy, so long as he is not the actual party who makes a contract with his Client for the payment of the differences, in which case he ceases to be a Broker, and becomes a principal. It is also submitted that this risk of being obliged to accept or deliver takes speculative transactions on the London Stock Exchange out of the operation of the

<sup>1</sup> Ch. III. p. 124 et seq.

gambling statute; and that the decision of *Thacker vs. Hardy* will be regarded as a correct statement of the law, not only in England, but in the United States, where, according to the course of business, there is always a delivery of the securities sold.

The American decisions, with the exception of those made in Pennsylvania, where, as we have seen, the law has been criticised as unique and opposed to all of the authorities,<sup>1</sup> all substantially follow the rule laid down by the English courts.

In the case of *Lehman vs. Strassberger*,<sup>2</sup> the question was fully discussed in the Circuit Court of the United States. In that case the plaintiffs, who were cotton-factors in New York, bought and sold as such for the defendant cotton for future delivery; it being the understanding between them that, in all sales or purchases of cotton by them for him, there was to be no delivery, but that differences should be paid, except when special instructions were given to receive or deliver cotton. These contracts were entered into by plaintiff according to the rules of the Cotton Exchange of New York. By these rules, which were given in evidence, an actual delivery of cotton is provided for and required in every contract, unless waived in some mode by the subsequent assent or conduct of both parties; or unless the party having the option to make or require an actual delivery fails or declines to exercise his option or to insist upon delivery. The action was based upon a note given by defendant to the plaintiffs, the consideration arising out of the transactions of defendant in such contracts, and included losses on contracts paid by plaintiffs for defendant, and their commissions for buying and selling. It did not appear that the names of the parties with whom plaintiffs made the trans-

<sup>1</sup> Lewis on the Law of Stocks and Bonds, etc., 109; Criticism of Mr. Justice Briggs in 38 Leg. Int. 116.

<sup>2</sup> 2 Wood C. C. 554.

actions were disclosed to the latter. The defence was that the note was void under the statute of New York in relation to gaming. There was a verdict below for the defendant, and the case was reviewed on exceptions to the charge of the judge, upon the subject of wager contracts.

The Circuit Court held that, while it might be conceded that contracts for the future delivery of cotton, when it is agreed there shall be no delivery, but that differences shall be paid, are wagering contracts, and void as between the parties, it was not the case disclosed in the record; the parties here were not *parties* to any contract for the sale or delivery of cotton. The plaintiffs never sold to or bought from the defendant any cotton. The parties with whom defendant contracted were persons other than plaintiffs, whose names were not disclosed, and plaintiffs were only factors of defendant to make contracts with other parties, the plaintiffs being mere agents for the defendant in the transaction. "This is the case," said the court, "to put it in its strongest light for the defendant, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case the contract between a principal and agent, made after the illegal transactions are closed, although it may spring from them and be the result of them, is a binding contract."<sup>1</sup>

And where the Client gives his Broker an order to purchase stock for him, and the latter does so in accordance with the instruction and the usages of the Stock Exchange, but the Client subsequently refuses to take the stock, and the Broker, after notice, sells it, the latter is entitled to recover the loss made, together with commissions, etc.; and it is no defence to the

<sup>1</sup> Citing *Durant vs. Burt*, 98 Mass. 167; *Petrie vs. Hanney*, 3 T. R. 418; also *Tenant vs. Elliot*, 1 Bos. & P. 3; *Owen vs. Davis*, 1 Bailey, 315; *Arm- Farmer vs. Russell*, id. 296.



action that the contract made by the Broker with another member of the Stock Exchange is illegal, as being contrary to the statute of Massachusetts (declaring sales of stock void when the seller has no stock at the time of the alleged sale), especially where the purchasing Broker is not shown to have known this fact, or that the same was not legal under the Statute of Frauds.<sup>1</sup>

Following these decisions is one<sup>2</sup> in which the Court of Appeals of Kentucky examined the subject in a very able and exhaustive opinion, in which they reviewed the entire method of transacting business upon the Cotton and Produce Exchanges of New York, in a case where a Broker was directed to make operations for a Client, and fully sustained their validity. In that case H. & Co., commission-merchants, at various times directed S. & Co., commission-merchants and members of the New York Cotton and Produce Exchanges, to buy for their account, for future delivery, certain specified quantities of cotton, pork, and lard. These purchases, H. & Co. knew, were made on the Exchanges, subject to the rules and regulations of the trade. As the time approached when, according to the terms of the contracts of purchase, the goods were deliverable, H. & Co. directed the purchases to be "transferred" to subsequent months. This was understood and intended to be a direction to sell the goods, and purchase a like quantity for delivery in the months designated. The rules of the Exchanges required that all contracts should be made in the names of members; and, H. & Co. not being members, their contracts were made in the name of S. & Co., who became liable on the contracts as principals, and advanced the money necessary to cover the loss. H. & Co. failed, and for the advances so made for them, and brokerage and other expenses,

<sup>1</sup> *Durant vs. Burt*, 98 Mass. 161. (Ky.), 727. To same effect, *Warren*

<sup>2</sup> *Sawyer vs. Taggart*, 14 Bush vs. *Hewitt*, 45 Ga. 201.

S. & Co. made claim against their assignee. Payment was resisted on the ground that the transactions were mere illegal wagers, to be settled by the payment of "differences." In each instance it was shown that S. & Co. entered into agreements with third persons, and the transactions were carried on in a manner similar to the method of doing business on the Stock Exchange.

S. & Co. having thus shown that they entered into contracts valid on their face for the purchase of the goods they were directed by H. & Co. to buy; that, pursuant to directions, they resold the same, and delivered to the purchasers delivery orders which they had received; and that on such resales there were losses, which they paid—the court held that they made out a clear *prima facie* right to recover; that the fact that some of the persons with whom S. & Co. made contracts for purchases had not the goods contracted for on hand at the times of entering into the contracts, and that they had no reasonable expectation of acquiring them except by purchasing in the market, did not render the contracts unenforceable, much less vicious. The court also held that the fact that the purchaser for future delivery did not intend to receive and pay for the goods, but to resell them before the date of the delivery, furnished no ground for holding that it was tacitly understood the contract was not to be performed, and was to be settled by the payment of differences.

The court cited, to sustain this last proposition, the case of *Ashton vs. Dakin*.<sup>1</sup> In that case the plaintiff, a Stock-broker, was directed by the defendant to buy for him certain stock for future delivery, which was done through another Broker, who made the contract in his own name, and became liable for its performance. Before the day of delivery the defend-

<sup>1</sup> 4 Hurl & Norm. 867.

ant ordered the stock to be sold, and it was sold at a loss, which the Broker paid. The plaintiff repaid the Broker, and brought his action for the amount. The defendant pleaded that the transaction was a mere wager on the market price of the stock. The arbitrators found that the defendant never, in fact, intended to take a transfer of the stock, and that the plaintiff was fully aware of this when the orders were given, and that they were given and accepted on the implied terms and understanding that the plaintiff should not be called on by the defendant to deliver the stock or any part thereof, and that he should not be called on to receive or pay for it; but that it should be resold by the plaintiff before the time of payment arrived, and the defendant should, on the resale, either pay or receive the difference, after debiting him with the plaintiff's charges on the purchase and resale. The court held that this was not a gaming transaction.<sup>1</sup>

In the case of *Marshall vs. Thruston*,<sup>2</sup> a suit was brought by a bank upon notes given for money advanced by it. The defence interposed was, that the defendant having been engaged in speculating in the future prices of Tennessee State bonds, the notes in suit were given for the differences due on settlement; and the question arose whether the bank's furnishing the money to the defendant had any necessary connection with the speculative transactions in bonds. The court, at the trial, instructed the jury that if defendant, in his gaming transactions, had sustained losses, "and the bank, at his request,

<sup>1</sup> In the following cases the defence of wager was sustained: *Pickering vs. Cease*, 79 Ill. 328; *Lyon vs. Culbertson*, 83 id. 33; *Waterman vs. Buckland*, 1 Mo. App. 45; *Rourke vs. Short*, 34 Eng. L. & Eq. 219. On examination, however, these cases will be found to be "optional contracts" in an illegal sense, *i. e.* speculations in the differences of market values, the seller having the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for the subject-matter of the contract, as they saw fit.

<sup>2</sup> Supreme Ct. of Tenn.; reported in 10 Cent. L. J. 242. See also *Vanderpoel vs. Kearns*, 12 E. D. Smith; 170.

paid the amount of such losses, or if the bank paid such losses without being requested, and defendant afterwards ratified its action, and gave his notes for the amount so paid, such amount can be recovered of him in this action;" but "if the bank furnished defendant with money for the purpose of enabling him to engage in an unlawful undertaking, it could not recover of him the amount so furnished." Both these instructions were sustained as unexceptionable by the appellate court. In response to the suggestion that mere knowledge on the part of the bank of the intended use of the money by defendant would make it an aider and abettor in the gambling, Cooper, J., explained that the test in such cases is whether the plaintiff requires any aid from the illegal transaction in order to establish his claim, or whether he was in fact a participant in the illegal transaction. And a recovery by the bank was allowed in that case, because no such participation appeared.<sup>1</sup>

(e.) "*Options*," "*Puts*," "*Calls*," "*Straddles*," or "*Spread-eagles*."

Both in England and in the United States a large number of transactions in stocks are made through the instrumentality of what are termed "option" contracts, and we have consequently separated that class of cases from the bulk of decisions in which the defence of wager has been interposed, although, as we shall see, these "options" are not treated differently from other wagering contracts by the courts, where it appears that they are mere covers for gambling operations, and the parties to them contemplate and intend that mere "differences" shall be paid.

An "option," in the sense of the present work, may be explained as a contract by which A, in consideration of the payment of a certain sum to B, acquires the right or privilege of

<sup>1</sup> See also *Hatch vs. Douglass*, 16 Am. Law Rev. 181.

buying from or selling to B specified securities at a fixed price within a certain time.<sup>1</sup>

These options are of three kinds—viz., “calls,” “puts,” and “straddles,” or “spread-eagles.”<sup>2</sup> A “call” gives A the option of calling or buying from B, or not, certain securities. A “put” gives A the option of selling or delivering to B, or not, certain shares of said securities. A “straddle,” or “spread-eagle,” is a combination of a “put” and a “call,” and secures to A the right to buy of or sell to B, or not, a certain number of shares of specified securities.<sup>3</sup>

These optional contracts are recognized both in the rules of the London<sup>4</sup> and of the New York Stock Exchange.<sup>5</sup>

In England it seems that the legality of optional contracts in stocks has never been tested in the courts. How far the peculiar system of transacting business on the London Stock Exchange would militate against their legality remains to be seen.

It is perfectly plain, however, that in England, as in the United States, these options frequently represent real transactions, and that there may be a *bona fide* intention of delivering or receiving stocks when they are issued. As it has been well said,<sup>6</sup> “Let us suppose a person who is possessed of certain securities to be desirous of selling if he could get a bid, say one per cent. higher than the present price, and to be at the same time desirous of doubling his holding if he could buy at a price one per cent. lower. If he gives his instructions in this form to his Broker, it may well happen that the price does not fluctuate sufficiently to make it possible to

<sup>1</sup> Story vs. Salomon, 71 N. Y. 420; see also opinion of Van Hoesen, J., in court below, 6 Daly (N. Y.), 531; Yerkes vs. Salomon, 11 Hun (N. Y.), 471; Harris vs. Tumbridge, 83 N. Y. 93.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Rule 72, London Stock Exch.

<sup>5</sup> Arts. XIII., XIV., XV., By-laws N. Y. Stock Exch.

<sup>6</sup> Law and Customs of Stock Exchange, by Melsheimer and Laurence (London, 1879), 24.

carry out either transaction. But the same practical result may be attained with certainty by the owner of the securities taking a one per cent. price for the put and call of them, for the money thus received would be, as it were, a reduction of one per cent. in the purchase price if the security is put upon him, and would equally, as it were, go to increase the selling price if it is called from him. There is, of course, this difference, that if the security is at precisely the same price on the option day as on the day the bargain was made, it may happen that the security is neither put nor called, and in that case the owner will have secured his one per cent. without further liability, and be in a position to repeat the process. Under such circumstances, the option could not be said to be void as a wager."

And these observations are equally forcible when applied to dealings in stock options in the United States, many, if not most of them, being issued under the circumstances above disclosed.

In England, however, as we have seen, the validity of these stock privileges does not seem to have been passed upon by the courts,<sup>1</sup> but doubtless the same rule will be adopted there as was introduced by the Court of Appeals of New York in the case of *Story vs. Salomon*,<sup>2</sup> although, as we have intimated, the methods of dealing in London may justify a different result. In this case the cause of action was based upon what is known as a "straddle"—i. e., a double privilege, a "put" and "call" combined, in the following form:

"NEW YORK, May 15, 1875.

"For value received the bearer may call on the undersigned for one hundred shares of the capital stock of the Western Union Telegraph Com-

<sup>1</sup> But see *Hargreaves vs. Parsons*, 13 M. & W. 561, where the question of the validity of such instruments was incidentally involved.

<sup>2</sup> 71 N. Y. 420.

pany at seventy-seven and one half per cent. any time in thirty days from date.

"Or the bearer may, at his option, deliver the same to the undersigned at seventy-seven and one half per cent. at any time within the period named, one day's notice required.

"All dividends or extra dividends declared during the time are to go with the stock in either case, and this instrument is to be surrendered upon the stock being either called or delivered.

"S. N. S."

The defendant Salomon, having suspended payment, subsequently agreed with the plaintiff to settle with him, and thereupon endorsed upon the contract "Settled at market, seventy-two and three quarters," which was the price of the stock on that day. The defence was that the contract was in violation of the statute against gaming; but the court held, in the absence of parol proof to the contrary, that there was nothing illegal on the face of the contract.

One may pay for an option to take at a future day, at a certain price, a farm, or article of personal property, and most contracts for the purchase or sale of merchandise at a future day are made with a view to the market price on the day of performance. There is always an element of speculation and uncertainty as to that; but it has never been supposed that there is any betting by such contracts. The court in such a case will not infer an illegal intent unless obliged to; and the transaction, unless intended as a mere cover for a bet or wager on the future price of the stock, is legitimate. If it had been shown that neither party intended to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract would have been illegal. But, in the absence of such evidence, upon the above reasoning the contract was sustained.

The recent case of *Harris vs. Tumbridge*<sup>1</sup> reiterates the law

<sup>1</sup> 83 N. Y. 92.

concerning stock options. In that case the plaintiff entered into a speculation in stock, purchasing through her Broker a straddle contract on 100 shares of Lake Shore at 62½. The Broker on the day after the purchase sold short against the straddle. The result was a loss to the plaintiff. This short sale was assailed by the plaintiff as unauthorized, negligent, and unskilful, and defended by the Broker as prudent and customary, and ratified by his principal. The questions of want of skill, negligence, and authorization having been decided against the Broker, the court, per Finch, J., next attacked the further argument of the defendant—viz., that the transaction was a gambling one, and as such prohibited by statute: "The contract was not of necessity a wager contract. That it might have been, does not at all dispense with the necessity of proving that it was. The evidence now relied on is contained in a description of a 'straddle' given by the witness L. He describes it first, and then adds, 'In other words, it is a bet that the stock will fluctuate so much.' He speaks of a straddle generally. He does not speak of the actual transaction between these parties at all. As to that, there is no proof of its character as a mere wager. We cannot supply it by suspicion, or infer it from the making of a contract not necessarily within the prohibition."

The form of the contract, however, is not binding, and does not decide the question, because it would not be difficult to make the contract relating to a bet apparently lawful, while the intent with which it was entered into would be to avoid or evade the statute; accordingly, parol evidence is always admissible to show the intent of the parties. And where the question was asked, "Was it your intention, at the time those contracts, or either of them, were made, to tender or call for the stock, or merely to settle upon the difference?" the Supreme Court of New York held that the evidence should



have been admitted, and reversed a judgment on the ground of its exclusion.<sup>1</sup>

The courts of Illinois, in several cases arising out of transactions in grain, have very strongly condemned "puts" and "calls," when it appeared that mere differences were to be settled by them, without any real delivery or acceptance of the grain being contemplated or intended.

In *Wolcott vs. Heath*,<sup>2</sup> in distinguishing such contracts from *bona fide* time bargains, the court said: "What the law prohibits, and what is deemed detrimental to the public interests, is, speculations in differences in market values, called, perhaps, in the peculiar language of the dealers, 'puts' and 'calls,' which simply means a privilege to deliver or receive the grain or not, at the seller's option. It is against such fictitious gambling transactions, we apprehend, the penalties of the law are levelled."

And in the subsequent case of *Pickering vs. Cease*,<sup>3</sup> the court declared that optional contracts, where the seller had the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling, for the grain just as they chose, and which on the maturity of the contracts were to be filled by adjusting the differences in the market values, were in the nature of gambling transactions, and would not be tolerated by the law.

And upon the authority of these cases, the same court<sup>4</sup> held that a contract for the sale of wheat in store, to be delivered at a future time, which required the parties to put up margins as security, and provided that if either party fails on notice to put up further margins, according to the market price, the other might treat the contract as filled immediately, and

<sup>1</sup> *Yerkes vs. Salomon*, 11 Hun (N. Y.), 471. But see *Porter vs. Viets*, 1 Biss. 177.

<sup>2</sup> 78 Ill. 433.

<sup>3</sup> 79 Ill. 328.

<sup>4</sup> *Lyon vs. Culbertson*, 83 Ill. 33.

recover the difference between the contract and market price, without offering to perform on his part, or showing an ability to perform, is illegal and void, as having a pernicious tendency.<sup>1</sup>

The same question came before the United States District Court in Illinois, in the interesting case of *In re Chandler*.<sup>2</sup> In that case C. conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the "cash oats" as they arrived in the market, and took all the "options" offered him for June delivery—his purpose being to own all the oats in the market, and compel those who had sold "options" for June to pay his price, or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options and the price he should establish for cash oats on the last day of June, when the options matured. In pursuance of this plan, he purchased between the 15th of May and the 18th of June 2,500,000 bushels of cash oats—being all, or substantially all, the cash oats in the market—and also bought June "options" to the amount of 2,939,400 bushels. The total amount of oats in store in Chicago on the 18th of June was only 2,700,000 bushels, and the total amount received during the remainder of the month was only 800,000 bushels. As part of the machinery of this corner, C. also sold "puts," or privileges of delivering to him oats during the month of June, in the following form, duly signed :

"Received of E. F. \$50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock P.M. of June 30, 1872, by notification or delivery, 10,000 bushels

<sup>1</sup> See also *Rudolf vs. Winters*, 7 Neb. 125, where the court holds that a contract to operate in grain options, to be adjusted according to the differences in the market value thereof, is a contract for a gambling transaction, which the law will not tolerate ; but, upon the facts reported, it would seem very difficult to sustain the conclusion of the court in that case.

<sup>2</sup> 13 Am. Law Reg. (n. s.) 310.

No. 2 oats, regular receipts, at 41 cents per bushel, in store ; and if delivered, we agree to receive and pay for the same at the above price."

The amount paid by the purchaser of these "puts" was one half cent per bushel. "Puts" of this description were issued to the extent of 3,700,000 bushels. The market having heavily declined, C. failed, and before the time of the maturity of the "puts" the holders of the same claimed to have made tender to the bankrupt of the quantity of oats called for by their contracts, and, the oats not having been accepted and paid for, they sold them upon the market under the rules of the Board of Trade, and proved their claims for the differences. These claims they sought to charge against the estate of C., and his assignee moved to expunge them from the record on the ground that they constituted mere gambling transactions. The court found that all of the claimants knew that C. was engaged in manipulating the market with express reference to a "corner," that C. was endeavoring to keep the price up, while the sellers of "options" and holders of "puts" were endeavoring to break down the price ; and that the "contracts in question partake of all the characteristics of a wager," and "that it was as manifestly a bet upon the future price of the grain in question, as any which could be made upon the speed of a horse or the turn of a card ;" that it conclusively appeared that no delivery of the grain was intended by these holders of puts, because they knew that C. controlled all the oats in the market and fixed the price, and that their only expectation of success depended on their being able to break the market before their time for delivery had expired. The court held that the test was—"Did the parties intend to sell on one side and buy on the other the oats which purported to be the subject-matter of the transaction ? or did they only intend to adjust the differences?" and that the evidence was overwhelmingly against the claimants on this point. The court further

held that, although the above transaction might not be contrary to any statutory law of the State of Illinois, the wagers were, nevertheless, void at common-law, as contrary to public policy. The idea was disaffirmed that it was intended to be understood that every "option" contract or "put" for the delivery of grain or stock was void; but upon the evidence in the present case it was established that the transactions were bets upon the price of oats, and that as it was obvious that the effect of them was to beget wild speculations, to derange prices, to make prices artificially high or low, thereby tending to destroy healthy business and unsettle legitimate commerce, there can be no doubt of their injurious tendency, and they should be held void as against public policy.<sup>1</sup>

Upon a close examination, these cases will not be found to conflict with the cases of *Bigelow vs. Benedict*<sup>2</sup> and *Bonsall vs. Kirkpatrick*,<sup>3</sup> hereafter referred to, where, in the absence of extrinsic evidence to show that they were intended as wagers, the court sustained option contracts as legal.

It is well settled that, in the absence of statutory prohibitions, a *bona fide* contract or time bargain for the future delivery of stocks, gold, or any commodity—as grain, for instance—is legal, although at the time the vendor has not the stocks, gold, or commodity which he has agreed to deliver. The vendor may reasonably expect to produce or acquire them in time for a future delivery; and, while wishing to make a market for them, is unwilling to enter into an absolute obligation to deliver, and therefore bargains for an option which, while it relieves him from liability, assures him of a sale in case he is able to deliver. And the purchaser may, in the same way, guard himself against loss beyond the consideration paid for the option in case of his inability to take the goods.<sup>4</sup>

<sup>1</sup> See also *Waterman vs. Buckland*,  
1 Mo. App. 45.

<sup>2</sup> 70 N. Y. 202.    <sup>3</sup> 72 Pa. St. 115.

<sup>4</sup> *Hibblewhite vs. McMorine*, 5 M.

We select from the large bulk of cases that sustain this proposition two of the leading ones which fully illustrate it.

In England the question was considered in *Hibblewhite vs. McMorine*.<sup>1</sup> In that case the plaintiff brought an action of assumpsit to recover damages for the breach of a contract with defendant, by which the latter agreed to purchase from plaintiff certain shares of a railroad company "to be transferred, delivered, and paid for on or before the 1st day of March, 1839, or at any intermediate date that defendant might require them." The declaration averred a readiness and offer on the part of the plaintiff and a refusal of defendant to accept the shares. The defence pleaded was that the plaintiff never possessed or owned the shares in question, and had no reasonable expectation of becoming possessed of the same within the time provided for the fulfilment of the contract otherwise than by purchasing the same after the making of the contract. To this plea a demurrer was interposed, which was unanimously sustained and judgment ordered for the plaintiff. Parke, B., said: "I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods of which he has not possession at the

& W. 462 (overruling a contrary doctrine laid down by Lord Tenterden in *Bryan vs. Lewis*, Ry. & M. 386; see also *Lorymer vs. Smith*, 1 B. & C. 1; 2 D. & R. 23); *Mortimer vs. McCallan*, 6 M. & W. 58, and 9 id. 636; *Thacker vs. Hardy*, L. R. 4 Q. B. D. 685, 688; Ex parte *Phillips* and Ex parte *Marnham*, 2 De G. F. & J. 634; *Currie vs. White*, 45 N. Y. 822; *Bigelow vs. Benedict*, 70 id. 202; *Kingsbury vs. Kerwin*, 11 J. & S. (N. Y.) 451, aff'd 77 id. 612; *Wolcott vs. Heath*, 78 Ill. 433; *Sanborn vs. Benedict*, id. 309; *Pixley vs. Boynton*, 79 id. 351; *Pickering vs.*

*Cease*, id. 328; *Logan vs. Musick*, 81 id. 415; *Cole vs. Milmine*, 88 id. 349; *Corbett vs. Underwood*, 83 id. 324; *Lyon vs. Culbertson*, id. 33; *Porter vs. Viets*, 1 Biss. 177; *Clarke vs. Foss*, 7 id. 540; *Brua's Appeal*, 55 Pa. St. 294; *Smith vs. Bouvier*, 70 id. 325; *Noyes vs. Spaulding*, 27 Vt. 420; *Brown vs. Hall*, 5 Lans. (N. Y.) 180; *Rumsey vs. Berry*, 65 Me. 570; *Cassard vs. Hinman*, 14 How. (N. Y.) Pr. 84, aff'd 1 Bosw. 207; *Stanton vs. Small*, 3 Sandf. 230; *Mellvaine vs. Egerton*, 2 Robt. (N. Y.) 422; *Brown vs. Speyer*, 20 Grat. 309.

<sup>1</sup> 5 M. & W. 462.

time of the bargain, and has no reasonable expectation of receiving." All of the judges repudiated the contrary doctrine of Lord Tenterden.<sup>1</sup>

In New York, the Court of Appeals<sup>2</sup> has recently held that a contract whereby A, for a valuable consideration, agrees to purchase of B gold coin at a specified price within a specified time, B having the option to deliver or not, was not invalid on its face. By the contract the defendant bound himself to take the gold if delivered within the time specified at the price named, and he ran the hazard of loss in case the market price of gold should be more than ten per cent. less, at the time specified for the delivery, than the price he agreed to pay. That there was an element of hazard in the contract is plain; but the same hazard is incurred in every optional contract for the sale of any marketable commodity, when for a consideration paid one of the parties binds himself to sell or receive the property at a future time at a specified price, at the election of the other. The contract in the case in question was attacked on the ground that it was a wager within the statute of New York, and in that respect it differs from *Hibblewhite vs. McMorine*.

The principle of these cases is fully sustained in all of the other states, and particular allusion has been made under the foregoing subdivisions to such of them as were deemed important.

In fine, "options" stand on the same footing as any other species of contract. Where it appears that the intention of the parties is to contract for the payment of "differences" merely, and not to deliver or accept stock, the law pronounces it a wager, irrespective of the form used to cover the transaction; but, on the other hand, where there is a *bona fide* in-

<sup>1</sup> In *Bryan vs. Lewis and Lorymer vs. Smith*, *supra*.

<sup>2</sup> *Bigelow vs. Benedict*, 70 N. Y. 202.

tention to deliver or receive property, the agreement will be sustained.

In some states, however, as we have seen, the courts seem inclined to stamp these contracts as void on their face,<sup>1</sup> thus reversing the well-settled maxim of the law, before alluded to, that where a contract is capable of two constructions that one will be adopted which is legal.

(f.) "*Conspiracy*" to *Affect Stocks, etc.*; "*Pools*," "*Corners*."

1. *Conspiracies*.—At common-law there were three criminal offences against public trade, which were distinctly known as "forestalling," "regrating," and "engrossing."

"Forestalling" was defined by statute 5 and 6 Edw. VI. c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there—any of which practices makes the market dearer to the fair trader.<sup>2</sup>

"Regrating," by the same statute, was described to be the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place. This also enhances the price of the provisions, as every successive seller must have a successive profit.<sup>3</sup>

"Engrossing" was the getting into one's possession or buying up large quantities of corn or other dead victual, with intent to sell them again. This was considered to be injurious to the public by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And the total engrossing of any other commodity, with an intent to sell it at an unreasonable price, is an offence indictable and finable at common-law.<sup>4</sup> The penalty for these

<sup>1</sup> Illinois and Nebraska.

<sup>3</sup> Id.

<sup>2</sup> 4 Black. Com. (Sharsw. ed.) 158.

<sup>4</sup> Id.

misdemeanors by the common-law was discretionary fine and imprisonment.

Under the head of "Monopolies," in a subsequent chapter of the same statute, combinations among victuallers or artificers to raise the price of provisions or any other commodities, or the rate of labor, were punishable as misdemeanors.

The statutes concerning the above offences were repealed by 12 Geo. III. c. 71, and by 7 and 8 Vict. c. 24 the law of engrossing or regrating was abolished.<sup>1</sup>

The effect of the repeal of these statutes was not, however, to render transactions such as above defined legal. On the contrary, many of the acts embraced in these statutes were, and still are, illegal, and criminal at common-law.<sup>2</sup> But it is a question, not free from difficulty, as to the extent the old common-law principles in this respect should be applied to the present methods of transacting business. A most cursory

<sup>1</sup> Mr. Wharton, in his excellent treatise on Criminal Law (7th ed. vol. ii. § 2801), gives the following history of these misdemeanors: "These offences are taken from the Roman law. The Roman title is 'Dardanariatus,' and consists in the artificial production of dearness and scarcity in any market staple (*ne dardanarii ullius mercis sint*), but especially of grain. Popular feeling was then, as it has been often since, aroused against the monopolizers or hoarders of food. The *Ædiles* were vested with jurisdiction to repress such offences; and Plautus illustrates the process of prosecution before them in a passage where the Parasite calls for proceedings against those *qui consilium iniere* [something like our own conspiracies to raise prices] *quo nos victu et vita prohibeant*. So Livy tells us of a fine imposed upon *frumentarii ob annonam compressum*. The proceedings allowed in such cases took definite shape in the famous *Lex Julia de Annona*, which declared the

usurious hoarding of grain to be a public crime. In the exposition of the law we are told that *lege Jul. de ann. pœna statuitur adversus eum qui contra annonam fecerit societatemve coierit, quo annona carior fiat*; and by the first section a penalty is imposed on interference with transportation, or in any way preventing the free carriage of grain: *Eadem lege continetur, ne quis navem nautamve retineat aut dolo ne faciat, quo magis detineatur*. Still sharper edicts followed, of which Ulpian mentions one: *Ne aut ab his qui cœntas merces supprimunt* [purchasers] *aut a locupletioribus* [hoarders of their own produce] *annona oneratur*. Zeno issued a special statute against monopolizers who, to create an artificial scarcity, buy up all a necessary staple, in order subsequently to sell at their own price. Such offenders, on conviction, were to be sentenced to confiscation of goods and to banishment."

<sup>2</sup> Raymond vs. Leavitt, Sup. Ct. of Mich. 13 Cent. L. J. 110.



perusal of the definitions of "forestalling," "regrating," and "engrossing" will show that if they were enforced at the present day the commercial interests of the world would be seriously curtailed and impeded; and there is no doubt that many of the old doctrines have been practically abrogated.<sup>1</sup>

In England it was held that the common-law offence of engrossing or regrating applied only with respect to the necessities of life;<sup>2</sup> and it is very evident that these statutes did not embrace, and were not intended to apply to, dealings in securities or stocks, for the very obvious reason that the latter description of property did not come into existence in England until many years after they were passed; but, as we shall see, the comprehensive and elastic principles of the common-law upon the subject of illegal conspiracies have practically kept alive the spirit of these old statutes, and furnished remedies sufficiently adequate to prevent combinations in this new species of property when they threatened the public property, trade, or commerce.

The modern rule, then, would seem to be this: that the offences of "regrating," "forestalling," and "engrossing," as they were defined under the statutes of Edward, no longer exist (unless revived by express legislation) either in England or in this country, so far as *individual* action or property is concerned; but in place thereof the common-law declares that combinations or conspiracies by *several* persons to engross or absorb any particular necessary staple of life, to the detriment of the public, are illegal and the subject of indictment.<sup>3</sup>

<sup>1</sup> Raymond vs. Leavitt, *supra*; Story on Sales, 647; Benjamin on Personal Property, 414 (1873); 2 Whart. Cr. Law (7th ed.), § 2802 and note (h).

<sup>2</sup> Pettamberdass vs. Thackoorseydass, 5 Moo. Ind. App. 109; 7 Moo. P. C. C. 239; 15 Jur. 257.

<sup>3</sup> See authorities heretofore cited under this subdivision, and consult also, in this connection, the interesting case of *In re Chandler*, 13 Am. Law Reg. (n. s.) 210; s. c. 6 Biss. C. C. 53, *sub nom.* *Ex parte Young*.

The case of *Rex vs. Waddington*<sup>1</sup> illustrates this proposition, it being there held that the spreading of rumors with intent to enhance the price of hops, in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, with intent to induce them not to bring their hops to market for a long time, and thereby greatly to enhance the price, is an offence at common-law, notwithstanding the repeal of 5 & 6 Edw. VI. c. 14 by 12 Geo. III. c. 71. Although this case has been severely criticised, it has not, it seems, been directly overruled.<sup>2</sup> And, as we have intimated, the general rule has been extended to embrace combinations or conspiracies to affect the price or market for stocks and government securities.

This was held in the celebrated case of the *King vs. De Berenger and others*.<sup>3</sup> In that case De Berenger and seven others were tried and convicted of conspiracy in disseminating false reports and rumors that a peace would soon be made between England and France, and that Napoleon Bonaparte was dead, thereby attempting to occasion, without any just or true cause, a great increase and rise of the public government funds and securities, to the injury and damage of the subjects of the king, who should, on a certain day, purchase and buy such securities. The defendants moved an arrest of judgment upon several grounds: *inter alia*, that no crime known to the law had been committed; that no adjudged case of conspiracy had gone as far as this; and that, if it were not a crime in itself to raise the price of government funds, a conspiracy to do so would not be illegal unless some collateral object were stated to give it a criminal character. Lord Ellenborough, C. J., in an opinion, the doctrine of which was endorsed by all of the

<sup>1</sup> 1 East, 143-160.

<sup>2</sup> See 1 Bish. Cr. Law, § 527, 528, and notes to 6th ed.; Raymond vs.

Leavitt, Sup. Ct. Mich. 13 Cent. L. J. 110.

<sup>3</sup> 3 Mau. & S. 67.

judges, overruled all of the grounds relied on, holding that the conspiracy was by false rumors to raise the public funds and securities. The crime lay in the act of conspiracy and combination to effect that purpose, and it would have been complete although it had not been pursued to its consequences, or the parties had not been able to carry it into effect. The purpose of such a conspiracy is itself mischievous, as it strikes at the price of a vendible commodity in the market, and, if it gives it a fictitious price by means of false rumors, it is a fraud levelled against all the public, being against all such as may possibly have anything to do with the funds on that particular day. While the raising or lowering of the public funds is not *per se* a crime—for a man may have occasion to sell out a large sum, which may have the effect of depressing the price of stocks, or may buy in a large sum and thereby raise the price on a particular day—yet the conspiracy by a number of persons to raise the funds on a particular day is an offence prejudicial to a certain class of subjects.<sup>1</sup>

This case was directly approved by the English courts in 1876 in *Reg. vs. Aspinall*,<sup>2</sup> where it was held that a conspiracy to procure, by fraud and falsehood, the shares of a company to be quoted in the official list, and thus give a fictitious value to the shares beyond what they would otherwise bring in the market, is a fraud upon the public, and an indictable offence. In that case the indictment alleged that the defendants were promoters of the E. Company, Limited, and that application had been made, on behalf of the company, to the Committee for General Purposes of the Stock Exchange to order the quotation of the company in the official list of the Stock Exchange, under the 129th Rule, to the effect that

<sup>1</sup> See also *Rex vs. Gurney*, 11 Cox C. C. 414. So a combination to fix the price of salt is unlawful (*Rex vs. Norris*, 2 Ld. Ken. 300).

<sup>2</sup> L. R. 1 Q. B. D. 730; aff'd 2 id. 48.

the committee would order the quotation of a new company in the official list, provided that the company was of *bona fide* character, etc.; that the requirements of Rule 128 had been complied with, requiring the production of documents, etc., and list of allottees, etc.; that two thirds of the whole nominal capital proposed to be issued had been applied for and unconditionally allotted to the public; and that a member of the Stock Exchange was authorized by the company to give full information as to the formation of the undertaking, and able to satisfy the committee as to all particulars they should require. It was also averred that defendants requested a firm of Stock-brokers to give the information before mentioned and to apply to the committee to order the quotation of the shares of the company in the official list, and employed the Brokers to sell 5000 shares of the company on behalf of alleged vendors of patents; and that defendants unlawfully conspired and agreed, by divers false pretences, to injure and deceive the committee, and to induce them, contrary to the true intent and meaning of the rules of the Exchange, to order a quotation of the shares of the company in the official list of the Stock Exchange, to induce persons who should buy and sell the shares to believe that the company was duly formed and constituted, and had, in all respects, complied with the rules of the Stock Exchange, so as to entitle the company to have their shares quoted in the official list; and that defendants in pursuance of the conspiracy, falsely pretended to Z. and other members of the committee that the number of shares applied for by the public was 34,365, and that the amount received thereon, at 10s. per share, was £17,282, and that 15,000 had been allotted to the patentee, and that no shares had been conditionally allotted, and thereby induced the committee to order the shares to be quoted in the official list.

Upon a motion in arrest of judgment, after conviction, the

Court of Queen's Bench held that this count was sufficient, and the case had been fully made out against the defendants. The Court of Appeals affirmed this judgment. The court held that, as the rules of a public body of such celebrity as the London Stock Exchange must be widely known to Brokers and others dealing in shares, it was plain that to obtain a quotation of their shares in the official list must be advantageous to companies and enhance their value. Purchasers, on seeing the shares so quoted, would have a right to believe that the requirements of the Stock Exchange had been complied with, and that the company whose shares they proposed to purchase had therefore satisfied an independent body like the committee of its respectability and solvency, and it could not be doubted that they would be willing to give a higher price for the shares in consequence. It was further held that the crime of conspiracy is completely committed the moment two or more have agreed that they will do at once, or at some future time, certain things; but that it was not necessary, in order to complete the offence, that any one thing should be done beyond the agreement; and that an agreement made with a fraudulent mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud is a criminal conspiracy.

Another phase of an indictable conspiracy was presented in *Reg. vs. Esdaile*.<sup>1</sup> There the information charged that the defendants, intending to deceive, defraud, and prejudice such of the shareholders of the Royal British Bank as were not aware of the true state of the affairs of the bank, and to induce others to become customers and creditors of the bank, and to purchase and hold shares therein, did conspire falsely and fraudulently to publish and represent that the bank and its affairs had been during the year 1855, and then were, in a

<sup>1</sup> 1 F. & F. 213.

sound condition, and producing profits; and that defendants published and distributed a balance-sheet apparently showing such a condition, and also paid a dividend, knowing that such dividend had not been earned, and also fraudulently issued new shares while the bank was in an unsound state. Upon the trial thereof, Lord Campbell, C. J., charged the jury that if, at the time mentioned, the bank was insolvent, which fact was known to the defendants, and that they nevertheless entered into the design to represent that the bank was in a prosperous state, with a view to deceive the shareholders or to delude the public into becoming shareholders, a conspiracy would be made out. And the defendants were all convicted.<sup>1</sup>

<sup>1</sup> The rule of law in civil cases is even more stringent than that of the criminal law, and the general principle may be stated that, in every case of fraud for which an indictment can be sustained, an action for damages or relief in law or equity will lie at the instance of the grieved party. The general principles upon which a civil liability for fraud rests were stated by the vice-chancellor in *Barry vs. Croskey*, 2 J. & H. 1, as follows: "First, every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified. Secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified; provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. And, thirdly, but to bring it within the principle, the injury must be the immediate and not the remote consequences of the representations thus made."

These principles have been applied

to an infinite number of transactions in which the directors, promoters, organizers, or originators of companies or schemes, either through the instrumentality of Stock Exchanges or otherwise, have been guilty of fraud or deceit in inducing persons to become purchasers of shares or interests in the company. The following are some of the leading cases: *Peek vs. Gurney*, L. R. 6 H. L. Cas. 377; *Pasley vs. Freeman*, 3 T. R. 51; *Bevan vs. Adams*, 19 W. R. 76; 22 L. T. (n. s.) 795; *Beattie vs. Ebury*, L. R. 7 H. L. Cas. 102; *Pontifex vs. Bignold*, 3 Scott N. R. 390; *Shrewsbury vs. Blount*, 2 id. 588; *Clarke vs. Dickson*, 6 C. B. (n. s.) 453; *Moore vs. Burke*, 4 F. & F. 258; *Gray vs. Collins*, id. 302; *Smith vs. Clench*, id. 578; *Cross vs. Sacket*, 6 Ab. (N. Y.) Pr. 247; *Wakeman vs. Dalley*, 44 Barb. (N. Y.) 498; *Cazeaux vs. Mali*, 25 id. 578; s. c. 15 How. Pr. 347; *Morse vs. Swits*, 19 id. 275; *Newbery vs. Garland*, 31 Barb. 121.

And where the directors of a joint-stock bank, knowing it to be in a state of insolvency, issued a balance-sheet showing a profit, and thereupon declared a dividend of 6 per cent., and issued advertisements inviting the public to take shares upon

By the law of New York no conspiracies are punishable criminally except those there stated, and, among others, the conspiring of two or more persons "*to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of justice or the due administration of the laws,*" shall constitute a misdemeanor. Under this broad and comprehensive language, which is practically the rule in all of the States, either by adoption of the common-law or express statute, it will not be difficult to punish infamous conspiracies or combinations, whether their object be to affect the "necessaries" of life, or securities, or other property in which the public have an interest.<sup>1</sup>

2. "*Corners,*" "*Pools.*"—Closely akin to the foregoing is the subject of "*corners*" and "*pools.*"

A "*corner*" is a scheme or combination of one or more

the faith of their representations that the bank was in a flourishing condition, on an *ex officio* information filed by the attorney-general they were found guilty of a conspiracy to defraud. *Reg. vs. Brown*, 7 Cox C. C. 442; *Same vs. Esdaile*, 1 F. & F. 213.

<sup>1</sup> In 1874 the Legislature of the State of New York (Laws 1874, ch. 440) passed a very stringent law against persons circulating rumors to affect the stock market, as follows:

"Sec. I. Every person who shall knowingly circulate false intelligence with intent of depreciating or advancing the market price of the public funds of the United States, or of any State or Territory thereof, or of any foreign country or government, or the stocks, bonds, or evidence of debt of any corporation or association, or the market price of any merchandise or commodity whatever, shall be deemed guilty of a misdemeanor, and shall be punished, upon conviction thereof, by a fine of not

exceeding five thousand dollars, and imprisonment for a period not exceeding three years, or either.

"Sec. II. Every person who shall forge the name of any person, or of the officer of any corporation, to any letter, message, or paper whatever with intent to advance or depreciate the market price of the public funds of the United States, or of any State or Territory thereof, or of any foreign country or government, or the market price of bonds or stock, or other evidence of debt issued by any corporation or association, or the market price of gold or silver coin or bullion, or of any merchandise or commodity whatever, shall, upon conviction, be adjudged guilty of forgery in the third degree, and shall be punished by imprisonment in a state-prison for a term not exceeding five years." This statute has never been interpreted by the courts, although one or more indictments have been found under it.

“bulls” who are “long” of certain stocks or securities, to compel the “bears,” or persons “short” of the stock, to pay a certain price for the same. Or it may be a combination to force a fictitious and unnatural rise in a market for the purpose of obtaining the advantage of dealers and purchasers, and all persons whose necessities or contracts compel them to use or obtain the thing “cornered.”<sup>1</sup>

A “corner” is manifestly much more obnoxious to reason and to the law when it has for its object the artificial enhancement of the market value of any kind of property which purchasers are compelled to buy, than when the scheme is formed to “squeeze” the “bears,” or persons who have sold property which they did not possess, hoping to buy it when it reached the level of their expectations. Yet it is doubtful whether the “corner” is not equally illegal in the one case as in the other.

But, in any case, a combination or scheme which has for its object the fraudulent inducing of persons to sell property for future delivery, with the intention or purpose of compelling such persons to buy in or purchase the same at a price fixed by the combination, destroying a chance or opportunity of a fair purchase, is void.<sup>2</sup>

These “corners” are carried out in forms varying as they relate to different kind of property, or as they are managed in one or more places, where the course of dealing is not the same. A “corner” in stocks may be illustrated in this manner: The “bears” in the market are those persons who, from a variety of reasons, believe or hope that the price of a certain security will decline, and without having any of it, they sell the same, borrowing the security for delivery from some third person, expecting to buy it at a lower price and return it to

<sup>1</sup> Raymond vs. Leavitt, 13 Cent. L. J. 110.

<sup>2</sup> Barry vs. Croskey, 2 Johns. & H. and cases hereafter cited.



the lender. The difference between the price at which they sell the security and the price which they are compelled to pay for the same constitutes the profit or loss of the transaction. If the security decline, there is a profit; if it advance, there is a loss. The "bulls," on the other hand, discovering that there is a "short" representation in the security, sufficiently large to justify the movement, combine together to buy all, or as much of the security as will enable them to accomplish their object; and when they have succeeded they become masters of the situation. The "bears" are then compelled to buy; but, as all the security is in possession or under the control of the "bulls," they are forced to pay any price which the cornering party chooses to ask for it. The "corner" is then complete.

The validity of the combinations which we have here briefly described has been passed on by the courts on several occasions, and in each instance they have been declared illegal.

In the interesting case of *Barry vs. Croskey*,<sup>1</sup> which arose out of certain dealings on the London Stock Exchange, a state of facts was revealed which showed that the defendants, having first put themselves in control of all the shares and allotments of a certain company, induced a Stock-jobber to sell a number of shares for future delivery—*i. e.*, the next settling-day—and then compelled him to settle his contracts at figures satisfactory to them, before he knew of the whole truth of the transaction. He subsequently brought a bill in Chancery, in which he averred that defendants, the directors and secretary of a projected railway company, having, partly by allotments to fictitious persons and partly by purchase, obtained possession of all the shares of a given class in the company, through their Broker induced plaintiff, a Stock-jobber,

<sup>1</sup> 2 Johns. & H. 1.

to contract to sell them certain of such shares, to be delivered upon the settling-day to be appointed by the committee of the Stock Exchange; and that they then, by false and fraudulent representations made by them in their official character to the committee of the Stock Exchange, procured the appointment of a settling-day; upon the arrival of which plaintiff, being by reason of the scheme thus contrived by defendants unable to procure the shares he had contracted to deliver, except at a ruinous premium, was compelled to pay defendants a sum specified in the bill to release him from his contract; and the bill prayed for a declaration that such a contract was fraudulent and void, or inoperative, and for repayment to plaintiff of the amount he had paid in respect thereof. The company having been joined as defendants to the bill, upon the ground that they had adopted the fraudulent representations made by their directors and secretary to the committee of the Stock Exchange, the court held, on demurrer by the company, that although the company might have benefited by the fraudulent representations—*e. g.*, by obtaining a quotation and an increased price for their shares—and although they might be answerable for that increased price, or for any other direct advantage derived from such fraudulent representations, yet it not being shown that the company knew such representations were made by their directors with intent to defraud the plaintiff, by compelling him to perform his contract, or even that they knew of the existence of such a contract, the company were not responsible for the loss plaintiff had thus incidentally sustained, and the company's demurrer was allowed; but it was further held that the bill was not open to demurrer on the part of the other defendants on any ground, it having averred that the several defendants had combined to practise jointly this "scheme of deceit," as the court termed it.

Sampson vs. Shaw<sup>1</sup> presents an action between members of the cornering combination. In that case it appeared that the plaintiff, the firm of T. & Co., and one R., entered into an agreement to operate in the stock of a certain railway company for the purpose of getting a "corner," T. & Co. taking one half, and the plaintiff and R. each a quarter interest in the operation, the plan of operation being as follows: T. & Co. were to be the managers, and were to buy up a large quantity of the stock and control it in such a manner as to make a large demand for it, so that parties selling on time would be compelled to pay large differences; T. & Co. were then to receive and make proposals and agreements thereon for the purchase of stock to be delivered at a future day, the parties agreeing to sell not then having the stock in possession or owning it, and then the sellers, when the day for delivery should arrive, would be compelled to pay such prices or differences as the parties to the combination might ask; the money to carry on the operation was to be furnished, and the profits or losses shared or borne by the parties in proportion to their respective interests; that said stock at the time was of little, if any, intrinsic value, and was selling in the market for about five dollars per share; that R. paid in money from time to time as called for under the agreement for carrying on the operations. T. & Co. did proceed to make purchases, and in so doing expended a large sum of money. The operation in the stock was not successful, and the money invested therein was substantially lost. The plaintiff brought an action against the representatives of T. & Co. for money had and received. The defendant, in answer, showed that the amount had been actually appropriated or expended in carrying out the above-described agreement.

The auditor to whom the cause was referred ruled that the

<sup>1</sup> 101 Mass. 145.

agreement for operating in the above manner was illegal and void; and this ruling was sustained, on appeal, by the Supreme Court, which held that neither party as against the other could enforce what remained to be done, or correct what had been done, under a conspiracy of that description, and that such an agreement did not make the parties partners.

In a very recent case,<sup>1</sup> the Supreme Court of Michigan examined the subject of a "corner" in grain. In that case the plaintiff advanced certain money to the defendants for the purpose of controlling the wheat market, with a view of forcing up prices and producing a "corner," and compelling parties who had contracts to fill to pay a higher price for wheat to fill them. The action was to recover the money advanced to the defendant for this purpose, and the court, through Campbell, J., in a very able and thorough opinion, held that the plaintiff was not entitled to recover. The court said that "the object of the arrangement between these parties was to force a fictitious and unnatural rise in the wheat market, for the express purpose of getting the advantage of dealers and purchasers whose necessities compelled them to buy, and necessarily to create a similar difficulty as to all persons who had to obtain or use that commodity, which is an article indispensable to every family in the country. That such transactions are hazardous to the comfort of the community is universally recognized. This alone may not be enough to make them illegal, but it is enough to make them so questionable that very little further is required to bring them within distinct prohibition.

The cases of the *Morris Run Coal Co. vs. Barclay Coal Co.*<sup>2</sup> and *Arnot vs. Pittston, etc., Coal Co.*,<sup>3</sup> held contracts involv-

<sup>1</sup> *Raymond vs. Leavitt*, 13 Cent. L. J. 110.

<sup>2</sup> 68 Pa. St. 173.

<sup>3</sup> 68 N. Y. 558.

ing similar dealings in coal to be against public policy. And, said the court, we think the reasoning of these cases is based on familiar common-law principles, which apply more strongly to provisions than to any other articles. . . . At common-law there is no doubt such transactions as were here contemplated, although confined to a single person, were indictable misdemeanors under the law applicable to forestalling and engrossing. "Some of our States have abolished the old statutes which were adopted on this subject, and which were sometimes regarded as embodying the whole law in such cases. But, so long as the early statutes only were repealed, it was considered that enough remained of the common-law to punish combinations to enhance the value of commodities. And when this doctrine became narrowed, it seems to have been considered that such combinations to enhance the price of provisions remained under the ban. . . . We do not feel called upon to regard so much of the common-law to be obsolete as treats these combinations as unlawful, whether they should now be held punishable as crimes or not. The statute of New York, which is universally conceded to be a limitation of common-law offences, is referred to in this case in 68 N. Y. as rendering such conspiracies unlawful. . . . "There may be difficulties in determining conduct as in violation of public policy, where it has not before been covered by statutes as precedents. But in the case before us the conduct of the parties comes within the undisputed censure of the land, and we cannot sustain the transaction without doing so on the ground that such dealings are so manifestly sanctioned by usage and public approval that it would be absurd to suppose the legislature, if attention were called to them, would not legalize them. We do not think public opinion has become so thoroughly demoralized; and until the law is changed, we shall decline enforcing such contracts. If

parties see fit to invest money in such ventures, they must get it back by other than legal means."

There are other American cases which sustain the doctrine laid down in *Raymond vs. Leavitt*.<sup>1</sup>

<sup>1</sup> The following charge of Mr. Justice Jamieson to a grand-jury of the Criminal Court of Chicago, Oct. 12, 1881, illustrates the condition of the law of Illinois upon the subject of which we are treating, so forcibly and thoroughly that we give it in full:

"GENTLEMEN OF THE GRAND-JURY,—Besides the statutes against gambling, selling liquor to minors, and acts of violence to person or property, which form the subject of your ordinary deliberations, I wish to call your attention to one which I will now read: 'Whoever contracts to have or give to himself the option to sell or buy at a future any grain or other commodity, stock of any railroad or other corporation, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or tries to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1000, or confined in the County Jail not exceeding one year, or both' (Revised Statutes Illinois, ch. 38, § 130). By this section are denounced three separate misdemeanors—the sale of options, forestalling the market, and cornering the market. All these have, either in name or in spirit, been always interdicted by the common-law, and that of forestalling was, at a very early day, made punishable in England by statute. Over a century ago a movement arose in England for abolishing the restrictions upon the freedom of trade, and these statutes were, or a part of them, repealed; but the common-law has remained, both there and in this country, unchanged, though fallen into disuse. The exigencies of the times induced

our legislature a few years since to re-enact the statute against forestalling, and to add to it those touching 'options' and 'corners,' which I have read—offences to which the criminal ingenuity of our ancestors seems not to have been equal. The first offence is the illegal sale of options for future delivery of grain and other commodities. The fact that property is sold to be delivered at a future day does not make the contract illegal, although it is not at the time possessed or owned by the seller, or that the time of its delivery is left within fixed limits, optional with the buyer or seller, though in one sense any such sale is a sale of an option apparently within the statute. What makes it a gambling contract is the intent of the parties that there shall not be a delivery of the commodity sold, but a payment of differences by the party losing upon the rise or fall of the market. Of this intent the jury are to be the judges, and it may be inferred directly from the terms of the contract or indirectly from the course of dealing of the parties (*Pickering vs. Cease*, 79 Ill. 328; *Walcott vs. Heath*, 78 id. 433; *Pixley vs. Boynton*, 79 id. 351). By this legislation the General Assembly had no purpose to interdict *bona fide* sales of commodities, but only such as are colorable or fraudulent, contrived by both parties as a cover merely for gambling transactions. The offence of forestalling originally consisted in the buying or contracting for merchandise or victuals coming to market, or dissuading persons from bringing their goods or provisions there, or inducing them to raise their prices (2 Whart. Crim. Law, 1849). Our

In the State of New York, the Supreme Court has decided that the law will not aid either party to enforce an agreement entered into for the purpose of advancing the selling price of stocks by means of fictitious dealings designed to produce a

statute has narrowed the offence so that it covers only forestalling the market by spreading false rumors to influence the price of commodities therein. The obvious purpose of the legislature in making this provision was to protect the people—the consumers as well as innocent traders—from the damage resulting from unnatural and fictitious fluctuations of prices, brought about by the false suggestions of interested persons. The offence of cornering the market is not, so far as I am aware, mentioned in the books, but it is one of a numerous family of frauds, of which the various members in their fight with society assume an infinitude of shapes and colors.

"To detect and punish these, notwithstanding the novelty and apparent innocence of their disguises, is the first business of courts of justice. The thing which we know as a 'corner' in the market might be briefly described as a process of driving unsuspecting dealers in grain, stock, and the like into a corral, and relieving them of their purses. The essence of the offence consists in the party securing a contract for the future delivery of some commodity at his option, and then, by engrossing the stock of such commodity in the market, making it impossible for the other party to complete his contract save by purchasing of his adversary at his own price, or paying in cash the difference fixed by such adversary. As was said of another great wrong, if this is not wrong then nothing is wrong. Public rumor on the street and in the press justifies me in saying that these offences are rife among us; and in asking you, if evidence to that effect should reach

you, to make them the subject of inquiry, your duty and mine is plain. However powerful the combination to defy the laws, and however difficult to detect and punish the crimes, we rank ourselves with the criminal if we fail to bring the terrors of the law to bear upon him. For one, I refuse not to hear what fills the ears of all to the discredit of the business men and methods of this city. The crimes indicated are being committed. It imports much that the validity of our statute and its sufficiency to reach the guilty parties should be early tested. If the spread of gambling has infected our business men, the consequences cannot but be disastrous. The course of business, instead of proceeding quietly and healthily, will become broken by fits of fever and panic; unlawful gains will be preferred to the slow profits of legitimate trade; our farmers, partaking of the prevalent spirit, will hold back their crops in expectation of corner processes, borrowing money on mortgage to carry on their operations, instead of realizing by the sales of farm products. It is said that these phenomena are already apparent, and they are charged to be the effects of violations of the law. I will only add that it is not your duty to seek inquisitorially for evidence that crimes have been committed. Should evidence come to you through the regular channels, your duty will be to consider it, and act fearlessly and promptly to vindicate the laws. I think I may promise, on the part of the judiciary of the county, that if you present men for crime it will not go unpunished, so far as the enforcement of the laws depends on them."

false impression on the minds of observers concerning their real value, and in that way to induce them to invest their money in such stocks. Such an agreement is void and against public policy.<sup>1</sup> But, as the facts are not given in the last-mentioned case, it is impossible to determine its value as a precedent.

And a contract entered into by the grain-dealers of a town which, on its face, indicates that they have formed a partnership for the purpose of dealing in grain, but the true object of which is to form a secret combination which would stifle all competition, and enable the parties, by secret and fraudulent means, to control the price of grain, costs of storage, and expense of shipment at such town, is in restraint of trade, and consequently void on the ground of public policy.<sup>2</sup>

So, an agreement entered into by several commercial firms, by which they bound themselves for the term of three months not to sell any Indian cotton-bagging except with the consent of the majority of them, was held to be a combination to enhance the price of the article, which was in restraint of trade and contrary to public order, and that the agreement could not be enforced in a court of justice.<sup>3</sup> So of a combination to control the sale and price of coal.<sup>4</sup>

In *Arnot vs. Pittston Co.*<sup>5</sup> the Court of Appeals of New York said, in speaking of a combination to enhance the price of coal by keeping the latter out of the market, "that a combination to effect such a purpose is inimical to the interests of

<sup>1</sup> *Livermore vs. Bushnell*, 5 Hun, 67, 72; 3 Rev. Stat. (5th ed.) 973, 285. The court cited *Thompson vs.* sub. 6 of § 8.

*Davies*, 13 Johns. 112; *Brisbane vs. Adams*, 3 Comst. 129; *Hooker vs.* 346; s. c. 22 Am. Rep. 171.

*Vandewater*, 4 Denio, 349; *Stanton vs. Allen*, 5 id. 434; *Marsh vs. Russell*, 2 Lans. 340; 2 Kent (7th ed.), 699-703; *Morris Run Coal Co. vs. Barclay Coal Co.* 68 Pa. 173; *Commonwealth vs. Carlisle*, Brightly, 36; 68 Pa. St. 173.

*India Association vs. Kock*, 14 La. Ann. 168.

<sup>4</sup> *Arnot vs. Pittston Canal Co.* 68 N. Y. 558; 23 Am. Rep. 190; *Morris Run Coal Co. vs. Barclay Coal Co.* 68 Pa. St. 173.

*King vs. De Berenger*, 3 Mau. & S. <sup>5</sup> *Supra*.



the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal, is too well settled by adjudicated cases to be questioned at this day. Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals; but when he endeavors to artfully enhance prices by suppressing or keeping out of the market the product of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such agreements are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of mere necessity, such as coal, flour, and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand."

But an agreement to combine stock for the purpose of terminating mismanagement by a change in the direction, through the instrumentality of a majority of votes at a regular election, is not in conflict with the requirements of the law, and in no wise derogates from its policy.<sup>1</sup> Nor is an agreement made between a like number of stockholders, in regard to holding their stock and selling the same together, invalid and in contravention of public policy and law.<sup>2</sup> So an agreement to form a "pool" for speculating in a particular stock is not necessarily void as against public policy.<sup>3</sup>

In concluding our review of these miscellaneous authorities in reference to combinations or corners, it is very important, as bearing upon their validity, to keep in mind that by the

<sup>1</sup> Havemeyer vs. Havemeyer, 11 J. & S. (N. Y.) 513.

<sup>3</sup> Quincey vs. White, 63 N. Y. 370, 383.

<sup>2</sup> Id. 507.

statute of New York "short" sales of securities are legalized.<sup>1</sup> This statute would seem to show most emphatically that the "public policy" of the State of New York sustains the practice of selling "short," which, as we have seen, is reprobated by the statutes of Massachusetts and Illinois; and the legislature, having encouraged and legalized these "short" contracts, it becomes a question of very grave doubt whether the judicial powers should be used to relieve persons selling "short" from these "corners," which are, after all, but the logical consequences of their own acts.

Where the parties organizing a corner are guilty of fraud, as in *Barry vs. Croskey*,<sup>2</sup> or where other circumstances intervene which render it manifestly unjust to enforce the result of the combination against the sellers of stocks, the courts may interfere. But, in the ordinary case of a "short" sale of stocks, it is very doubtful whether the courts should be used to protect persons from the consequences of their own folly in selling that which they do not own, in the hope and expectation that by such sales the property of others will be so much affected as to make their undertaking a success. And, if their expectations should fail, there would seem to be neither reason nor justice, especially in those States where "short" sales are sanctioned by statute, in the courts aiding them to get relief from their contracts.

In England "corners" sometimes arise out of the peculiar system which there prevails of dealing in shares before allotment, and they were the subject of investigation by the Royal Commission to which we have before alluded.<sup>3</sup> The operation is there explained as follows:

There is yet another aspect of the dealings in shares before allotment. It may be called the "stock-jobbing" aspect.

<sup>1</sup> Laws 1858, ch. 134.

<sup>3</sup> Rep. of Stock Exch. Com. 1878.

<sup>2</sup> 2 John. & H. 1.

Quite independently of the object of floating the company by getting its share capital subscribed, the promoters of worthless companies have the immediate object of receiving larger profits to themselves by traffic in these new shares. Dealings before allotment give them the requisite facilities for so doing.

There is another way in which this dealing before allotment operates on the Stock Exchange. The promoters of a new company send into the market and buy at a premium a large quantity of their own shares—a quantity so large, perhaps, relatively to the entire share capital, that when the settling-day comes after the allotment, and the sellers have to procure the shares to deliver, they find themselves in a difficulty; for the promoters—who, it must be remembered, have the allotment entirely in their own hands—have allotted so many shares to themselves or their friends, or to other persons, with an understanding that they must keep the shares allotted to them and not sell them, or have kept back so large a quantity of shares and not allotted them at all, that they have practically obtained the entire control of the market; and the dealers who have sold, in the expectation of having a free market of the entire share capital to buy in for the purpose of delivery, find themselves, as it is called, “cornered,” and obliged to pay such prices as the sellers choose to ask, to enable them to complete their contracts.

This practice of buying shares or other securities—the buyer having already possessed himself, or in some other manner procured the control, of so large a quantity of the thing which the seller has contracted on a future day to deliver, that the seller is “cornered,” and virtually placed at the mercy of the buyer—is not confined to the dealings before allotment in the shares of a new company or loan; but it is obvious that the allotment of the shares of a new company, being entirely in the hands of the promoters, gives them, if

they choose to purchase their own shares before the allotment, unusual facilities for carrying out such an operation. Accordingly, the rules of the Stock Exchange, as administered by the committee, provide methods of defeating such combinations.

In the case of new companies, all bargains before allotment are made for some future day, which is not fixed at the time the bargains are made, but it is to be fixed at a future day by the committee of the Stock Exchange; and if the committee refuse to fix a day of special settlement, all bargains that have been previously made are void. This system enables the committee to defeat operations of the character we have been just describing in cases where they can arrive at the necessary facts. They hear and entertain any objection that any member may make to the settlement being granted; and if it is shown to them that the promoters have by their dealings, coupled with the allotment, practically obtained the command of the market, and placed the dealers or sellers in an unfair position, the settlement is refused.

If false statements are made to the committee in order to induce them to grant quotation or settlement, the guilty parties may at law be made criminally or civilly liable. Thus in the Eupion Gas case, before referred to,<sup>1</sup> the promoters of the company were convicted on a charge of agreeing together by false pretences to deceive the members of the committee, and to induce them, contrary to the true intent and meaning of the rules, to order a quotation of the shares of the company in the official list; and thereby to induce and persuade all persons who should thereafter buy and sell the shares of the said company to believe that the latter was duly formed and constituted, and had in all respects complied with the rules so as to entitle them to have their shares quoted.

<sup>1</sup> Reg. vs. Aspinall, 1 Q. B. D. 730; 2 id. 48.

(g.) *General Principles Deducible from the Cases.*

The general result of the decisions, heretofore commented upon, or cited in this connection in the notes, upon the subject of wagering contracts may be summed up as follows:

1. Where a contract is made for the delivery or acceptance of securities at a future day at a price named, and neither party, at the time of the making of the contract, intends to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract is void either by virtue of statute or as contrary to public policy.<sup>1</sup>

2. That in each transaction the law looks primarily at the intention of the parties, which intention is a matter of fact for the jury to determine.<sup>2</sup>

3. That the form of the transaction is not conclusive; and oral evidence may be given of the surrounding circumstances and condition of the parties to show their intention, and that a contract purporting on its face to be a contract of sale is a mere gambling device, although the contract is in writing under seal.<sup>3</sup>

4. That option contracts—viz., “puts,” “calls,” and “straddles”—are not *prima facie* gambling contracts.<sup>4</sup>

5. To make a contract a gambling transaction, both parties must concur in the illegal intent.<sup>5</sup>

<sup>1</sup> Grizewood vs. Blane, 11 C. B. M. & W. 466; North vs. Phillips, 89 Pa. St. 250; Smith vs. Thomas, 10 Weekly Notes (Pa.), 112; Gresham, J., in Williar vs. Irwin, 12 Chic. Law News, 241. Porter vs. Viets, 1 Biss. 177, if contrary to this, is against all the authorities.

<sup>2</sup> All of the authorities agree upon this proposition.

<sup>3</sup> Yerkes vs. Salomon, 11 Hun (N. Y.), 471; Story vs. Salomon, 71 N. Y. 420; Hibblewhite vs. McMorine, 5

<sup>4</sup> Story vs. Salomon; Yerkes vs. Salomon, *supra*. But see Wolcott vs. Heath, 78 Ill. 43; Pickering vs. Cease, 79 id. 328; Lyon vs. Culbertson, 83 id. 33.

<sup>5</sup> Lehman vs. Strassberger, 2 Wood

6. The defence of wager must be affirmatively pleaded, and the burden of proof is upon the party asserting the same.<sup>1</sup>

7. In construing a contract, that construction is to be preferred which will support it, rather than one which will avoid it.<sup>2</sup>

8. A Broker who makes real contracts with third persons in behalf of his Client; with the understanding between the Client and Broker that the former shall never be called upon to pay or receive more than differences, can recover the amount paid out for his Client in the transactions, together with his commissions.<sup>3</sup>

9. A Broker who advances money to his principal to pay losses incurred in a stock-wagering transaction can recover the same either on a note or otherwise.<sup>4</sup>

10. A bill of exchange or promissory note given upon a stock-jobbing transaction is valid in the hands of a party who took it before it was due, for value, and without notice of the illegal consideration.<sup>5</sup>

11. But such a bill is void in the hands of the original parties, or in the hands of a person who takes it after it is due or with notice of the facts.<sup>6</sup>

C. C. 554; *Hibblewhite vs. McMorine*, 5 M. & W. 462; *Gresham, J., in Williar vs. Irwin*, 12 Chic. Law News, 241.

<sup>1</sup> *Dykers vs. Townsend*, 24 N. Y. 57; *Bigelow vs. Benedict*, 70 id. 206; *Story vs. Salomon*, 71 id. 420. But see *Rudolf vs. Winters*, 7 Neb. 127.

<sup>2</sup> *Bigelow vs. Benedict*, 70 N. Y. 202; *Story vs. Salomon*, *supra*.

<sup>3</sup> *Thacker vs. Hardy*, 27 W. R. 158.

<sup>4</sup> *Id.*; *Lehman vs. Strassberger*, 2 Wood C. C. 554; *Woodworth vs. Bennett*, 43 N. Y. 273-277; compare *Sampson vs. Shaw*, 101 Mass. 145; *Wyman vs. Fiske*, 85 id. 238; *Cannan vs. Bryce*, 3 B. & A. 179; *Amory vs. Meryweather*, 2 B. & C. 573; *Gregory vs. Wendell*, 39 Mich. 337.

<sup>5</sup> *Day vs. Stuart*, 6 Bing. 109; 3 Moo. & P. 334, Chit. Jr. 1448; *Greenland vs. Dyer*, 2 M. & Ryl. 422; *Faikney vs. Reynous*, 4 Burr. 2069; *Amory vs. Meryweather*, 2 B. & C. 573; s. c. Chit. Jr. 120; *Rawlings vs. Hull*, 1 C. & P. 11; *Woodworth vs. Bennett*, 43 N. Y. 273-277; *Wyman vs. Fiske*, 85 Mass. 238. But see *Tenney vs. Foote*, 4 Brad. (Ill.) 594.

<sup>6</sup> *Danforth vs. Evans*, 16 Vt. 532; *Brown vs. Turner*, 7 T. R. 630; 2 Esp. 631; *Aubert vs. Maze*, 2 Bos. & P. 374; *Steers vs. Lashley*, 6 T. R. 61, Chit. Jr. 533; *Amory vs. Meryweather*, 2 B. & C. 573. As to relieving parties from wagering transactions, see "Remedies," Ch. X.

## CHAPTER IX.

### NEGOTIABILITY AND NON-NEGOTIABILITY.

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#### *I. Negotiable Instruments.*

- (a.) *Origin and Nature of Negotiability.*
- (b.) *How Negotiability may be Established.*
- (c.) *Requisite Elements of Negotiability.*
- (d.) *Enumeration of Negotiable Instruments.*
- (e.) *Results of Negotiability—Bona-fide Holders.*

#### *II. Non-negotiable Instruments.*

- (a.) *Doctrine of Non-negotiability.*
- (b.) *Nature and Different Kinds of Shares of Stock.*
- (c.) *Negotiability as Applied to Stock Certificates.*

#### *III. Transfer of Stock.*

- (a.) *Method of Transfer.*
- (b.) *Transfer between Parties.*
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#### *IV. Lien of Corporations for Debts of Stockholders.*

#### *V. Forged Transfers.*

#### *VI. Dividends.*

#### *VII. Pledges of Stock.*

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#### *I. Negotiable Instruments.*

IN this chapter we propose to discuss the different kinds and general character of the property in which Stock-brokers deal, and which is comprehended under the general name of

“securities.” While an exhaustive review of this vast subject properly belongs to separate treatises, the design of the present undertaking contemplates only a brief and practical summary of the law in its general relation to the business of Stock-brokers and the dealings on the Stock Exchange.

The securities, then, which form the subject-matter of the business of Stock-brokers may be divided into two classes—first, those which are known as “negotiable;” and, secondly, “non-negotiable” instruments.

*(a.) Origin and Nature of Negotiability.*

At common-law choses in action were not assignable, so that the assignee could bring an action in his own name.<sup>1</sup> Blackstone’s views of a chose in action,<sup>2</sup> “that all property in action depends entirely upon contract, either express or implied, which are the only regular means of acquiring a chose in action,” is now regarded as too limited. A better definition is given by Bronson, C. J.,<sup>3</sup> who, adopting the distinction made by Blackstone between a chose in possession and a chose in action, proceeds to define the latter as including “all rights to personal property not in possession which may be enforced by action, and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of contract, express or implied. In both cases the debt or damage of the owner is a thing in action.”

Under the term “chose in action” were included all instruments acknowledging an indebtedness or promising to pay money. The inconvenience of this doctrine of non-assignability, in a country whose great aim was to foster and encourage commerce, was sufficient to condemn it; and we find the

<sup>1</sup> Co. Litt. 214 a, 266 a; Greenby vs. Kellogg, 2 Johns. 1; Pitt vs. Holmes, 10 Cush. 92, 96; Tiernan vs. Jackson, 5 Pet. 580.

<sup>2</sup> 2 Bl. Comm. 397.

<sup>3</sup> Gillet vs. Fairchild, 4 Den. 80.



courts very early recognizing a custom of merchants by which bills of exchange were made "negotiable"—that is, they could be transferred, and the holder, endorsee, or assignee might enforce payment of the same in his own name.<sup>1</sup>

<sup>1</sup> In *Thompson vs. Dominy*, 14 M. & W. 403, 407, Parke, B., said: "I never heard it argued that a contract was transferable except by the law-merchant." And, speaking of a bill of lading, he added: "It transfers no more than the property in the goods; it does not transfer the contract."

The assignee of a chose in action could maintain an action at law in the name of the assignor (*Grover vs. Grover*, 24 Pick. 261; *Pitt vs. Holmes*, 10 Cush. 92, 97; *Amherst Academy vs. Cows*, 6 Pick. 427); and the assignor acting in collusion with the debtor could not withdraw such a suit so as to bar a similar subsequent suit by the assignee (*Welch vs. Mandeville*, 1 Wheat. 233, aff'd 5 id. 277). The right of the assignee to use the assignor's name is incidental to the assignment, as *Morton, J.*, said, in *Eastman vs. Wright*, 6 Pick. 316, 322: "The assignor, by the assignment, gives authority to the assignee to use his name in any legal proceedings which may become necessary to give full effect to the assignment. The assignor becomes the trustee of the assignee, and a release made by him after notice of the assignment would be a fraud upon the assignee, and would not defeat an action brought for the benefit of the latter in the name of the former."

In a court of equity the assignee of a chose in action could always sue in his own name, irrespective of any promise by the debtor to pay him if he had no remedy at law (*Lett vs. Morris*, 4 Sim. 607; *Row vs. Dawson*, 1 Ves. Sen. 331). In the case last cited the Lord Chancellor said: "And though the law does not admit an assignment of a chose in action, this

court does, and any words will do."

See also *Ensign vs. Kellogg*, 4 Pick. 1. If the assignee could enforce his legal demand, he was left to his action at law in the name of the assignor; but if the latter refused to allow him to use his name, or otherwise acted in collusion with the debtor, then, upon sufficient facts shown, equity would allow the assignee to sue in his own name (*Ontario Bank vs. Mumford*, 2 Barb. Ch. 596; *Carter vs. United Ins. Co.* 1 Johns. Ch. 463; *Hammond vs. Messenger*, 9 Sim. 327).

It is provided by the English Judicature Act (1873, § 25, sub. 6) that a debt or other legal chose in action may be assigned so that the assignee shall have the same remedies thereon as the assignor, but subject also to all equities, at least to the extent of the assigned obligation (*Young vs. Kitchen*, L. R. 3 Ex. D. 127).

In the State of New York, since the adoption of the Code of Procedure, an assignee may sue in his own name, because he is the real party in interest (*Allen vs. Brown*, 44 N. Y. 228; *Zabriskie vs. Smith*, 13 id. 322; *Merchants' Bank vs. Union R. & Trans. Co.* 69 id. 373, 380). Since the adoption of the code (§ 111), it matters not whether the assignee gets the legal as well as the equitable title; if he gets the whole interest, he may maintain an action in his own name (*Freund vs. Importers, etc. Bank*, 76 N. Y. 352, 356; *Hastings vs. McKinley*, 1 E. D. Smith, 273). And, no doubt, in most of the States, an assignee of a chose in action may sue in his own name, either by force of statute or of established usage (*Act of 1829, Md. ch. 51*; *Cox vs. Sprigg*, 6 Md. 274; *Smith vs. Schibel*, 19 Mo. 140; *Long vs. Constant*, id. 320;

A negotiable instrument is a chose in action even before maturity, and may be transferred by assignment in the same manner as an ordinary chose in action; and if payable to order and transferred without endorsement by parol and manual delivery only, the transferee acquires only the rights he would have had had the instrument been originally non-negotiable—i. e., the rights of the payee at the time of the transfer.

In *Freund vs. Importers, etc., Bank*,<sup>1</sup> the payee of a check payable to order transferred it to B without endorsement, and it was held that he thereby became the lawful assignee and owner of it, and entitled to have and enforce payment from the bank which had certified it, but that he had no greater right than he would have had if it had been originally non-negotiable.<sup>2</sup>

It would not be profitable to enter into an abstract inquiry as to the meaning of the word *negotiable*, based either upon its etymology or history. It has no specially interesting or valuable history apart from its somewhat technical use as a word of commerce. The meaning of the original Latin word *negotium* is *business*,<sup>3</sup> and indicates that a negotiable instrument should relate to and facilitate business affairs; the past and present use of the word *negotiable* is therefore quite in harmony with its literal import,<sup>4</sup> and we may at once proceed

Cobb's Dig. (Ga.) 519; *Priolean vs. South W. R. Bank*, 16 Ga. 582; *Worthington vs. Curd*, 15 Ark. 491; R. S. Ill. (1881) 1003 (5); R. S. of N. J. (1877) 850, 19; R. S. Ohio, 952, § 26; Comp. S. of Neb. (1881) 534, § 30; Comp. S. of Kans. (1881) 604, § 26; Cal. Civ. Code, § 1459). In *Allen vs. Brown* (44 N. Y. 228), Hunt, C., referring to §§ 111 and 113 of N. Y. C. of P., says: "These provisions are intended to abolish the common-law rule which prohibited an action at law otherwise than in the name of the original obligee or covenantor, although he had transferred all his interest in the bond or covenant to another."

<sup>1</sup> 76 N. Y. 352.

<sup>2</sup> *Whistler vs. Forster*, 14 C. B. (n. s.) 248. Therefore, if the holder of a bill payable to bearer assigns it by deed to D., and afterwards transfers it by delivery to E., who takes it for value and without notice, E.'s title prevails over D.'s (*Aulton vs. Atkins*, 18 C. B. 249); but if E. had notice of the prior assignment, it would be sustained (*Sheldon vs. Parker*, 3 Hun, 498).

<sup>3</sup> *Andrew's Freund's Latin Dict.*

<sup>4</sup> Primarily the word negotiability means the capability of being negotiated—that is, transferred by endorsement and delivery so as to give the

to state the accepted definition of a negotiable instrument as a *written promise, order, or request for the payment of a certain sum of money to A, or order, or bearer*, a definition which is substantially adopted by and implied in the New York Revised Statutes,<sup>1</sup> which enact that "all notes in writing made and signed by any person whereby he shall promise to pay to any other person or his order, or bearer, any sum of money therein mentioned, shall, etc., and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

This provision was taken without material change from 3 and 4 Anne, c. 9, the preamble of which recites that it had been held that promissory notes were not endorsable over like bills of exchange.<sup>2</sup> This act contains several items of internal English history pertinent to the subject now under examination: 1. That prior to it (1704) promissory notes were not negotiable; 2. That bills of exchange were; 3. That such negotiability had its origin in the custom of merchants.<sup>3</sup>

When this custom was established is not precisely known. Chitty<sup>4</sup> says that the statutes show that bills of exchange (foreign) were in use by English merchants as early as the middle of the fourteenth century, but that there is no mention of them in the law reports until the time of James I.<sup>5</sup>

Inland bills of exchange came into use somewhat later, it is said, and did not come before the courts until the case of *Chat vs. Edgar*,<sup>6</sup> which was within the memory of Lord Holt.<sup>7</sup>

endorsee a right of action on the negotiated instrument, in his own name—and is nothing more; therefore, an instrument, *e. g.* a bill of lading, may be made negotiable by a statute or declared to be so by a court, and yet its negotiation may not be attended with all the consequences and effects which generally, but not always, result from the negotiation

of bills and notes (*Shaw vs. Railroad Co.*, 11 Otto, 557, 563).

<sup>1</sup> 1 Rev. Stat. 768, § 1.

<sup>2</sup> Referring, it is supposed, to *Clerke vs. Martin*, 2 Ld. Raym. 757.

<sup>3</sup> See *Richards vs. Warring*, 39 Barb. 42, 46.

<sup>4</sup> *Bills of Ex. 2.*

<sup>5</sup> *Martin vs. Boure*, Cro. Jac. 6.

<sup>6</sup> 1 Keb. 636, in 1636.

<sup>7</sup> *Buller vs. Crips*, 6 Mod. 29.

They were at first regarded with great disfavor by the courts and their use restricted to merchants;<sup>1</sup> but, as we have seen by the statutes of Anne<sup>2</sup> and William III.,<sup>3</sup> they were placed substantially on the same footing as foreign bills.

(b.) *How Negotiability may be Established.*

As the doctrine of the negotiability of bills of exchange was first established by the custom of merchants, some passing observations upon these customs, and their force and effect in the law, will not be out of place.

The law-merchant consists of those general customs of merchants which have received the sanction of judicial decisions, and are thereby recognized as binding and authoritative. Thus Lord Campbell says<sup>4</sup> that, "when a general usage has been judicially ascertained and established, it becomes part of the law-merchant which courts of justice are bound to know and recognize." Quite in harmony with this authority is the judicial exposition of Foster, J.,<sup>5</sup> where he says: "But the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common-law;" and, again (referring to two cited cases), "therefore these judicial determinations of the point are the *lex mercatoria* as to this question, which is part of the law of the land. But this finding of the jury in the present case is directly contrary to the *lex mercatoria* so fully settled and established by legal adjudications."

Thus the law-merchant, being made up of venerable and solemnized customs, according to some authorities, prevails over any modern usage, and to a large extent over the express stipulation of parties. As Blackburn, J., says in *Crouch vs.*

<sup>1</sup> Bromwick vs. Loyd, 2 Lut. 1582-85.

<sup>2</sup> 3 & 4 Anne, c. 9.

<sup>3</sup> 9 & 10 William III. c. 17.

<sup>4</sup> Brandao vs. Barnett, 3 C. B. 519, 530.

<sup>5</sup> Edie vs. East India Co., 2 Burr. 1216, 1226, 1228.

Crédit Foncier,<sup>1</sup> "There is no decision or authority that it is competent to a party to create by his own act a transferable right of action on a contract;" and again, "Where the incident is of such a nature that the parties are not themselves competent to introduce it by express stipulation, no such incident can be annexed by the trial stipulation arising from usage. *It may be so annexed by the ancient law-merchant*, which forms part of the law, and of which the courts take notice. Nor if the *ancient law-merchant* annexes the incident can any modern usage take it away." But it is very doubtful whether the courts at the present day will carry the *lex mercatoria* to such an extent as this language seems to contemplate.<sup>2</sup> And we find the definition of the law-merchant which we have given above adopted almost verbatim by Cockburn, C. J., in a case where the doctrine of negotiability was established by the custom of Bankers and Brokers.<sup>3</sup> "It is neither more nor less than the usages of merchants of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience. . . . By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated into the common-law, and may thus be said to form part of it." And in *Williams vs. Williams*<sup>4</sup> the endorsee of a promissory note having declared on the *custom of merchants*, it was objected that, the note having been made in London, the custom, if any, should have been laid as the custom of London; but the courts answered "that this custom of merchants was part of the common-law, and the courts would take notice of it *ex officio*, and therefore it was sufficient to

<sup>1</sup> L. R. 8 Q. B. 374, 386.

<sup>2</sup> See chapter on "Usages."

<sup>3</sup> *Goodwin vs. Roberts*, L. R. 10 Ex. 337, 347.

<sup>4</sup> Carth. 269.

say that such a person, *secundum usum et consuetudinem mercatorum*, drew the bill."

So, in a very recent case in the State of New York, the Court of Appeals held that the courts will take judicial notice of the general course of business in a community, including the universal practice of banks.<sup>1</sup>

It is interesting to notice with what jealousy this custom of merchants was regarded by the courts, and even Lord Holt was provoked by its aggressive influence to exclaim "that it amounted to the setting-up of a new sort of specialty unknown to the common-law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall."<sup>2</sup> There is no doubt that the judges were at that time intent in restraining the attempted aggressions of the merchants; for Lord Mansfield, in *Grant vs. Vaughan*,<sup>3</sup> speaks of the "first struggle of the merchants which made Holt so angry with them."

In more modern times we also find striking examples of the disposition of courts to act as conservators of legal principles when they are imperilled by encroaching customs and innovations. Thus in *Donnell vs. Columbian Ins. Co.*,<sup>4</sup> Story, J., says: "I am among those judges who think usages among merchants should be very sparingly adopted as rules of court, . . . as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles," and in *The Reeside*<sup>5</sup> he "rejoices to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages, and to discontinue any further extension of them;"<sup>6</sup> and Stone, J., another American judge,

<sup>1</sup> *Merchants' Nat'l Bank vs. Hall*, 83 N. Y. 338.

<sup>2</sup> *Clerke vs. Martin*, 2 Ld. Raym. 757.

<sup>3</sup> 1 W. Bl. 485, 487.

<sup>4</sup> 2 Sumn. 367.

<sup>5</sup> Id. 567.

<sup>6</sup> Similarly plain and pertinent expressions of judicial criticism were

uttered the warning that "it became us to feel our way cautiously, lest there grow up in our midst some third estate (of customs and usages) which shall in time usurp the government."<sup>1</sup>

In *Dykers vs. Allen*,<sup>2</sup> Senator Wright remarks, with some asperity, that "to allow the usages of Wall Street to control the general law in relation to any matter might result in the establishment of principles not always in accordance with sound morals. I prefer that legal principles should have a universal application, and that contracts should receive the same interpretation in the thronged and busy mart of a commercial metropolis that they do elsewhere." Whatever may have been the spirit in which these animadversions were made, it should be observed that they were, for the most part, directed against local customs and limited usages. But the power of the judges has been futile in arresting the usages or customs of trade, even when confined to certain localities and to particular occupations; and, as appears by the leading case of *Goodwin vs. Robarts*,<sup>3</sup> the usages of Stock-brokers and Bankers have been successfully invoked, even to confer upon instruments the powers of negotiability.<sup>4</sup>

If the original law-merchant had been a fixed and stereotyped system incapable of expansion, the negotiability of commercial paper would have ended where it began, with bills of exchange, or, more accurately, with foreign bills of exchange. Such, however, was not its character, and could not, and cannot be, in the very nature of things, because regulations for public convenience which are sufficient for the wants of one generation are not fully adapted and adequate to the

made by Gibson, C. J., in *Bolton vs. Miller, J., in Partridge vs. Ins. Co.,*  
*Colder*, 1 Watts, 360; by Tilghman, 15 Wall. 573, 579.

C. J., in *Stoevers vs. Whitman*, 6 Binn. <sup>1</sup> *Barlow vs. Lambert*, 28 Ala. 704.  
416; by Stuart, J., in *Harper vs.* <sup>2</sup> 7 Hill, 497. <sup>3</sup> L. R. 10 Ex. 337.

Pound, 10 Ind. 32; by Perkins, J., in <sup>4</sup> See this question further discuss-  
*Cox vs. O'Riley*, 4 id. 368; and by ed in chapter on "Usages," p. 342.

changed and multiplied wants of another. Lord Holt, indeed, attempted to stop the growth of the law-merchant and to exclude promissory notes from its operation;<sup>1</sup> but the British Parliament took sides with the merchants and passed 3 and 4 Anne, c. 9, and admitted notes to a substantial equality with bills. Later on in English history, a similar attempt ended with a similar result; the decision in *Glyn vs. Baker*,<sup>2</sup> that East India bonds were not negotiable, was followed by the immediate passing of 51 Geo. III. c. 64, by which such bonds became transferable by delivery.

So also, when the circulating qualities of bank-notes came to be judicially examined in *Miller vs. Race*,<sup>3</sup> Lord Mansfield said, "They are treated as money in the *ordinary course* and transactions of business by the general consent of mankind," which was clearly a case of a universal usage receiving judicial sanction.

And in *Goodwin vs. Robarts*, already cited, Cockburn, C. J., after showing by abundant illustration to what a broad scope it has expanded in the present day, asks, with great force, "Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment?" Whenever, and as fast as, new instruments are required, it is safe to predict that they will come into use; custom will adopt them, and then, in its turn and in the fulness of time, the custom will receive the sanction of the law. In this very case we have a most instructive example of the manner in, and the conditions upon, which custom adds to the number of negotiable instruments. The subject of litigation was scrip of the Russian government issued in England, by which that government promised not to

<sup>1</sup> *Clerke vs. Martin*, 2 *Ld. Raym.* 757.

<sup>2</sup> 13 *East*, 509.

<sup>3</sup> 1 *Burr.* 452, 457.



pay money, but to give certain bonds. This scrip was unlawfully pledged by one not the owner, and then sold by the pledgee to a *bona fide* purchaser. The contention on behalf of the owner was that scrip of this description not coming under the category of any of the securities for money which by the law-merchant are capable of being transferred by endorsement and delivery, and not being a security for money at all, but only for the future delivery of a bond, the rights of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against the owner. Cockburn, C. J., in rendering judgment, said: "The ninth paragraph of the special case contains the following statement, up to which, as it appears to us, the decision of the case turns: The scrip of loans to foreign government, entitling the bearer to bonds for the same amount when issued by the government, has been well known to, and largely dealt in by, bankers, money-dealers, and the members of the English and foreign Stock Exchanges, and through them by the public, for fifty years. It is and has been the usage of such bankers, money-dealers, and Stock Exchanges, during all that time, to buy and sell such scrip, and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery; and this usage has always been recognized by the foreign government, or their agent, delivering the bonds when issued to the bearers of the scrip."

The very serious point made by the plaintiff, that the scrip was not negotiable because it was not a *promise to pay money*, but to deliver a bond, was disposed of as follows: "We think that substantially, and in effect, *it is a security for money*, which till the bond shall be delivered stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. . . . The

usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such."

In *Crouch vs. Crédit Foncier*,<sup>1</sup> which is in contrast with the last case, but not inconsistent with it in its main feature, we find an example of the judicial rejection of a usage because, if admitted to exist, it was recent, and because an incident or attribute of negotiability could not be annexed to an instrument by the tacit stipulation of such a usage which could not be introduced into it by the express stipulation of the parties.

Again, in *Edie vs. East India Co.*,<sup>2</sup> the jury found, according to usage in London, that an endorsement to an endorsee, by name, without further words, was restrictive, but the King's Bench decided that the evidence should not have been admitted, the law-merchant being known to the court to be that it was not restrictive.

In *Partridge vs. Bank of England*,<sup>3</sup> the plea was that dividend warrants, payable to a specific person, without negotiable words, were, by a sixty years' custom of the bankers and merchants of London, transferable by delivery only, without endorsement. The Queen's Bench sustained the plea; but the Court of Exchequer rejected the custom, because it was opposed to the general law-merchant.

There are English cases in which the usage of a particular trade has been held to be binding on the persons engaged in the trade.

Thus in *Merchant Banking Co. vs. Phoenix Bes. Steel Co.*,<sup>4</sup> a usage of the iron trade that warrants for goods "deliverable to A. B., or assigns, by endorsement hereon," were considered to pass to the holders for value, free from any vendor's lien, was held to be binding on the steel company, which was the

<sup>1</sup> L. R. 8 Q. B. 374.

<sup>2</sup> 2 Burr. 1216.

<sup>3</sup> 9 Q. B. 396.

<sup>4</sup> L. R. 5 Ch. D. 205.

vendor. This usage was shown to have been quite general in the iron trade for nearly forty years, and Jessel, M. R., found that the steel company knew of it and gave the iron-warrant for the purpose of having it dealt with in accordance with the usage; and that having given such a document to a person knowing that he could use it, and intending that he should use it by obtaining money on it, it could not afterwards be allowed to set up against persons from whom he had obtained money, that they should not have the benefit thereof; that the company was estopped from so doing on the most elementary principles of equity.<sup>1</sup>

Without discussing the question further, it is sufficient for our purposes to show that by the English authorities, the custom of Bankers and Stock-brokers, such as was presented in the case of *Goodwin vs. Robarts*, is sufficient to confer upon instruments the important attributes of negotiability;<sup>2</sup> and it will be important hereafter to consider this doctrine in connection with the subject of certificates of stock, which are technically non-negotiable.

The precise question how far usage will be allowed to operate in extending negotiability has not been much discussed in our courts, but the general rules imposing limitations upon usage are strictly applied in the State of New York. Thus, in *Security Bank vs. National Bank*,<sup>3</sup> an attempt was made, by proof of usage among bankers, to give the word "certification" a larger scope than it had received by settled legal construction, and such proof was excluded.

<sup>1</sup> Consult also, in this connection, *rev'g 4 Daly, 199; Pardee vs. Fish, 60 Talty vs. Freedman's Trust Co. 1 N. Y. 265.*

*MacArth. 522; Matter of Leland, 6 Ben. (U. S.) 175; Humboldt Township vs. Long, 92 U. S. 642; Gaar vs. Louisville Co. 11 Bush (Ky.), 180; Dinsmore vs. Duncan, 57 N. Y. 573,*

<sup>2</sup> This case was followed and endorsed by *Rumball vs. Metropolitan Bank, L. R. 2 Q. B. Div. 194; 46 L. J. Q. B. Div. 346; 36 L. T. N. S. 240; 25 W. R. 366.*

<sup>3</sup> 67 N. Y. 458.

In a case in Iowa, however, it was shown that there was a usage among the merchants of the city of Burlington to regard certain paper—a note—payable “in currency” as negotiable. This usage was resisted on the ground that by the Constitution of that State all laws were required to be uniform, and therefore a note could not be negotiable in one city and not so in another, nor could a custom be recognized which would result in the same thing. In passing upon this question, the court said: “It must be remembered, however, that we have no statute prohibiting such custom. A custom in a particular locality, when not in violation of law, becomes a law to parties contracting with a knowledge of it. The same general rule as to what makes custom, and its application in the construction of contracts, obtains uniformly over the State. It might as well be claimed that all parties must make the same kind of contracts, as that they may not contract in reference to different customs.” And the usage was sustained.<sup>1</sup>

In some of the United States attributes of negotiability have been conferred upon certain instruments by statute, which are not recognized as negotiable by the law-merchant.

In Iowa<sup>2</sup> promises to pay in “property, labor, or money” are negotiable instruments with all the incidents of negotiability, if they contain the negotiable words “order” or “bearer;” and in Illinois, instruments payable in “personal property” may be “assigned by endorsement in the same manner as bills of exchange.”<sup>3</sup> A similar statute was passed in Georgia in 1799.

In Kansas,<sup>4</sup> all receipts for grain issued by any warehouse shall be negotiable by endorsement in blank, or by special endorsement in the same manner as bills of exchange and prom-

<sup>1</sup> Rindskoff vs. Barrett, 14 Iowa, 101. See also Vermilye vs. Adams Express Co. 21 Wall. 138.

<sup>2</sup> Rev. Code, 1880, § 2085.

<sup>3</sup> R. S. Ill. ch. 98 (4).

<sup>4</sup> R. L. 1881, § 1214.

issory notes. A Pennsylvania statute declares that bills of lading "shall be negotiable, and may be transferred by endorsement and delivery;" while a Missouri statute enacts that "they shall be negotiable by written endorsement thereon, and delivery in the same manner as bills of exchange and promissory notes."

According to the rule laid down by the Supreme Court of the United States in *Shaw vs. Railroad Co.*,<sup>1</sup> there is no material difference between the provisions and effect of the Missouri and Pennsylvania statutes; and this case expressly holds that neither of these statutes "puts bills of lading in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills or notes."

And none of the statutes to which reference has been made gives to obligations for the payment of property or labor "all of the incidents of negotiability" except that of Iowa.<sup>2</sup> In New York, the Factors Act<sup>3</sup> and the laws of 1858<sup>4</sup> give to bills of lading a circulating character.<sup>5</sup>

### *(c.) Requisite Elements of Negotiability.*

The essential qualities of a negotiable instrument are as follows:

1. *It must be in writing.* This is a necessity in the very nature of things, for otherwise it is not *in esse*, so that it can be endorsed or pass to bearer or be presented for payment;" but it may be in pencil within the custom of merchants;" and

<sup>1</sup> 101 U. S. 557, 562.

<sup>2</sup> *Supra*.

<sup>3</sup> L. 1830, ch. 179, § 3.

<sup>4</sup> Ch. 326, as amended by L. 1859, ch. 353.

<sup>5</sup> See those statutes referred to, and cases on construction of them, cited under "Bills of Lading," post.

<sup>6</sup> Story on Prom. Notes, § 9. The

provision of the N. Y. Revised Statutes assumes that the instrument therein referred to is in writing, for it would be absurd to require a written acceptance of something which exists only in parol.

<sup>7</sup> *Brown vs. Butchers' etc. Bank*, 6 Hill, 443; *Geary vs. Physic*, 5 B. & C. 234.

probably his initials constitute a sufficient signature of the maker's name, as they certainly do of the endorser's.<sup>1</sup>

It is not essential to the negotiability of an instrument that it be originally dated; but, if not dated, then all the parties to it must be presumed to consent that the person to whom it is intrusted may fill up the blank, because, ordinarily, it cannot be negotiated without a date;<sup>2</sup> and an instrument may be originally made and signed in blank, without sum or date, or time of payment, and endorsed while in the same condition, and then filled up by the lawful holder thereof so as to become negotiable. If one is so imprudent as to execute an instrument before he sees its contents, he is estopped from attacking its negotiability on that account;<sup>3</sup> and it is so held, also, as to the name of the payee.<sup>4</sup> The foregoing must be taken subject to the qualification that the *bona fide* holder of an incomplete instrument, negotiable but for some lack capable of being supplied, may supply the omission and hold the maker only when the latter has by his own act, or the act of another, invested with apparent authority by him, put the instrument into circulation as negotiable paper.<sup>5</sup>

A negotiable instrument must be a complete and perfect instrument when it is issued, or there must be authority reposed in some one to supply anything needed to make it perfect. In the case last cited, the person was named in the instrument, and therefore no one else could fill the blank; but, ordinarily, in the case of bills and notes, it is the lawful holder.<sup>6</sup> But the filling of a blank as to place of payment may amount to an alteration, causing invalidity.<sup>7</sup>

<sup>1</sup> Merchants' Bank vs. Spicer, 6 Wend. 443; Folger vs. Chase, 18 Pick. 63.

<sup>4</sup> Cruchley vs. Clarence, 2 M. & S. 90.

<sup>2</sup> Mitchell vs. Culver, 7 Cow. 336.

<sup>5</sup> Ledwich vs. McKim, 53 N. Y. 307.

<sup>3</sup> Chapman vs. Rose, 56 N. Y. 137; 279; Exon vs. Russell, 4 M. & S. Violett vs. Patton, 1 Cranch, 142, 505.

151; Russell vs. Langstaffe, Doug. 514.

<sup>7</sup> Woodworth vs. Bank of America, 19 Johns. 330.

In brief, the rule is that, if the maker of an instrument intrust it to a person for the purpose and with the intent that it shall go into circulation, he thereby invests him with authority to supply all needs, so far as there are blanks, for making it a perfect and binding negotiable instrument, unless it contains an express authority, to a person named, to supply such omissions.<sup>1</sup>

It has been held that a seal destroys negotiability;<sup>2</sup> and this was the rule in England,<sup>3</sup> as it was also at one time in New York,<sup>4</sup> but it is now otherwise.<sup>5</sup>

In many of the States, instruments under seal are made negotiable by statute, as is the case also in England as to India bonds<sup>6</sup> and many other specialties; and it is believed that the general rule in this country is that a seal does not impair negotiability.<sup>7</sup>

In the case of *Coe vs. The Cayuga Lake R. Co.*<sup>8</sup> Mr. Justice Blatchford reasserted the old rule, and held that a railroad company's note, if the company's seal is attached, does not come under the exception which allows "promissory notes negotiable by the law-merchant" to be sued on in the Federal courts in certain cases; but this view is against the modern authorities.<sup>9</sup>

2. *A negotiable instrument must contain an unconditional order or promise to pay*; but no precise form of expression is necessary for this purpose; it is sufficient if such an engagement can be collected from the words used. Thus, in the

<sup>1</sup> *Ledwich vs. McKim*, 53 N. Y. 314.

<sup>2</sup> *Conine vs. Junction, etc. R. Co.*, 3 Hous. 288; *Diamond vs. Lawrence County*, 37 Pa. 353; and that a scroll has the same force (*Pollock vs. Glassell*, 2 Gratt. 439).

<sup>3</sup> *Enthoven vs. Hoyle*, 13 C. B. 373; *Glynn vs. Baker*, 13 East, 509.

<sup>4</sup> *Clark vs. Farmers' Manuf. Co.* 15 Wend. 256. See *Warren vs. Lynch*, 5 Johns. 239.

<sup>5</sup> *Evertson vs. National Bank*, 66 N. Y. 14; *Brainerd vs. N. Y. etc. R.*

*Co.* 25 id. 496; *Bank of Rome vs. Rome*, 19 id. 20; *Birdsall vs. Russell*, 29 id. 220; *Grand Rapids etc. R. Co. vs. Sanders*, 17 Hun, 552; *DeLafield vs. Illinois*, 2 Hill, 159.

<sup>6</sup> 51 Geo. III. c. 64.

<sup>7</sup> *White vs. Vermont etc. R. Co.* 21 How. (U. S.) 575; *Clark vs. Iowa City*, 20 Wall. 583.

<sup>8</sup> 8 Fed. Rep. 534.

<sup>9</sup> See an article, "Is a Sealed Note Negotiable by the Law-Merchant," 24 Alb. L. J. 426.

State of New York, a due-bill in the following terms is negotiable: "Due A. Y. or bearer \$340, for value received, with interest, at L.'s office."<sup>1</sup> Perhaps a due-bill in that form would be negotiable also in England, but an I. O. U. is not.<sup>2</sup> The insertion of the words "on demand" in a due-bill indicates that it is meant to be something more than an acknowledgment;<sup>3</sup> and the use therein of the negotiable words "order" or "bearer" shows an intention to make it negotiable.<sup>4</sup> The word guaranty may be used in a promissory note in the sense of a promise, and, if so, does not affect its negotiability; but a strict guaranty is not a promissory note, and cannot be negotiable, because it is not an absolute promise to pay.<sup>5</sup>

3. *There must be an engagement for unconditional payment.* Thus a note payable "as soon as the crop can be secured, or the money raised from another source," is not negotiable;<sup>6</sup> nor is an agreement to pay provided the payee does a specified thing;<sup>7</sup> nor a promise to pay ninety days after the settling of books.<sup>8</sup> But if there is a promise of unconditional payment, the attaching of foreign clauses and agreements, though embarrassing, does not necessarily destroy negotiability;<sup>9</sup> nor does a mere reference in the note that it is secured,<sup>10</sup> nor a power of attorney attached to the note as a subsequent clause.<sup>11</sup>

<sup>1</sup> Sackett vs. Spencer, 29 Barb. 180; Russell vs. Whipple, 2 Cow. 536; Kimball vs. Huntington, 10 Wend. 675.

<sup>2</sup> Fisher vs. Leslie, 1 Esp. 425; and see Fesenmeyer vs. Adcock, 16 M. & W. 449; Payne vs. Jenkins, 4 Car. & P. 324.

<sup>3</sup> Smith vs. Allen, 6 Day (Conn.), 337.

<sup>4</sup> Carver vs. Hayes, 47 Me. 257; Franklin vs. March, 6 N. H. 364; Huyck vs. Meador, 24 Ark. 192.

<sup>5</sup> Durham vs. Manrow, 2 N. Y. 533; Bruce vs. Westcott, 3 Barb. 374; Weed vs. Clark, 4 Sandf. 31.

<sup>6</sup> Nunezo vs. Dantel, 19 Wall. 592; to same effect are Considerant vs. Brisbane, 6 Duer, 686; Worden vs. Dodge, 4 Den. 159.

<sup>7</sup> James vs. Hagar, 1 Daly, 517.

<sup>8</sup> Sackett vs. Palmer, 25 Barb. 179.

<sup>9</sup> Hodges vs. Shuler, 22 N. Y. 114; Craig vs. Cockroff, 2 Am. L. J. 328; Kirk vs. Dodge Ins. Co. 39 Wis. 138.

<sup>10</sup> Branning vs. Markham, 94 Mass. 454; Fancourt vs. Thorne, 9 Q. B. 312.

<sup>11</sup> Osborn vs. Hawley, 19 Ohio, 130.



And in *Zimmerman vs. Anderson*,<sup>1</sup> the addition of the words "with interest, waiving the right of appeal and all valuation, appraisement, stay, and exemption laws," was regarded as surplusage not affecting negotiability. And a note payable by instalments, with a condition that on the first default the whole shall become payable, is not on that account non-negotiable.<sup>2</sup> An order to pay out of a particular fund is not negotiable, because it is not an order for absolute payment.<sup>3</sup> The same is true of an order to pay out of drawer's share of partnership profit;<sup>4</sup> but the mere statement of a fund to which it is to be charged will not vitiate it,<sup>5</sup> or of a fund out of which the drawee may reimburse himself.<sup>6</sup>

4. *A negotiable instrument must be for the payment of money.* There is no doubt this is the prevailing rule, but there is a want of harmony in its application. Thus, an instrument payable in bank-notes or currency is not negotiable in England,<sup>7</sup> nor in Pennsylvania,<sup>8</sup> nor in Massachusetts,<sup>9</sup> nor in Iowa;<sup>10</sup> and this rule prevails very generally in this country. But in New York an instrument is negotiable which is payable in "paper currency" which is to be taken as legal-tender paper,<sup>11</sup> or in "current bank-notes,"<sup>12</sup> or in "York State bills,"<sup>13</sup> or "bank-notes current in the city of New York;"<sup>14</sup> but not a note made and payable in New York to be paid in paper currency to be current in Pennsylvania or New York, because the court could not judicially know that paper current in

<sup>1</sup> 67 Pa. St. 421.

<sup>2</sup> *Carlton vs. Kenealy*, 12 M. & W. 139.

<sup>3</sup> *Cole vs. Dalton*, 6 Daly, 484.

<sup>4</sup> *Munger vs. Shannon*, 61 N. Y. 251; *Worden vs. Dodge*, 4 Den. 159; *Gillespie vs. Mather*, 10 Pa. St. 28; *Harriman vs. Sanborn*, 43 N. H. 128.

<sup>5</sup> *Bull vs. Sims*, 23 N. Y. 570; *Skillen vs. Richmond*, 48 Barb. 428; *Kelley vs. Brooklyn*, 4 Hill, 263.

*Arnold vs. Rock Riv. R. Co.* 5

*Duer*, 207; *Griffin vs. Weatherby*, L. R. 3 Q. B. 753.

<sup>7</sup> *Ex parte Imeson*, 2 Rose, 225.

<sup>8</sup> *McCormick vs. Trotter*, 10 Serg. & R. 94.

<sup>9</sup> *Jones vs. Fales*, 4 Mass. 245.

<sup>10</sup> *Rinskoft vs. Barrett*, 11 Ia. 172;

*Huse vs. Hamblin*, 29 id. 501.

<sup>11</sup> *Frank vs. Wessels*, 64 N. Y. 155.

<sup>12</sup> *Pardee vs. Fish*, 60 id. 265.

<sup>13</sup> *Keith vs. Jones*, 9 Johns. 120; *Judah vs. Harris*, 19 id. 144.

Pennsylvania is money.<sup>1</sup> And so a note put in circulation here and payable in Canada money is not negotiable;<sup>2</sup> but a bill made in Canada and payable in New York in gold dollars is negotiable.<sup>3</sup> And the general rule is that an engagement to pay in merchandise or anything else than money is not negotiable;<sup>4</sup> but this rule is modified by statute in some of the States, allowing negotiable instruments to be payable in property or labor.<sup>5</sup>

5. *The amount to be paid must be certain.* Thus an engagement is not negotiable which is to pay a certain sum and "all fines according to rule;"<sup>6</sup> or a certain sum and "the demands of the sick-club;"<sup>7</sup> or a certain sum, deducting "what it may owe the maker;"<sup>8</sup> or all advances and expenses;<sup>9</sup> or a certain sum, and a percentage for collection fees in case of default.<sup>10</sup> Nor is an order negotiable which is drawn for "whatever sum you may collect."<sup>11</sup>

6. *A specified time of payment is not essential* to negotiability, because, if no time is specified, it is fixed by law as payable immediately, or on demand, which is the same thing in

<sup>1</sup> *Leiber vs. Goodrich*, 5 Cow. 186.

<sup>2</sup> *Thompson vs. Sloane*, 23 Wend. 71.

<sup>3</sup> *Chrysler vs. Renois*, 43 N. Y. 209.

<sup>4</sup> *Austin vs. Burns*, 16 Barb. 643; *Gushee vs. Eddy*, 77 Mass. 502; *Sears vs. Lawrence*, 15 id. 267.

<sup>5</sup> See ante, p. 493. In *Hodges vs. Shuler*, 22 N. Y. 114, 117, *Wright, J.*, expresses the opinion that "in Massachusetts there has been apparently a relaxation of the common-law rule so far as to extend the remedy against endorsers to notes payable absolutely in a medium other than cash; but in all other respects the legal rules applicable to negotiable paper are the same in that State as in our own." Perhaps *Jones vs. Fales*, 4 Mass. 245, *Sanger vs. Stimpson*, 8 id. 260, and *Gushee vs. Eddy*, 77 id. 502, may

justify such an opinion; but the relaxation has not gone very far, and, in the case last cited, *Merrick, J.*, says that "the endorser of an instrument payable in merchandise or specified articles, and therefore not negotiable, is not subject to the same liability as that of the endorser of a negotiable promissory note."

<sup>6</sup> *Ayrey vs. Fearnside*, 4 M. & W. 168.

<sup>7</sup> *Bolton vs. Dugdale*, 4 B. & Ad. 619.

<sup>8</sup> *Philadelphia Bank vs. Newkirk*, 2 Miles, 442.

<sup>9</sup> *Cushman vs. Haynes*, 37 Mass. 132.

<sup>10</sup> *Woods vs. North*, 84 Pa. St. 407; *Sweeney vs. Thickstun*, 77 id. 131; *First Nat. Bank vs. Gay*, 63 Mo. 33.

<sup>11</sup> *Jones vs. Simpson*, 2 B. & C. 318.

legal effect;<sup>1</sup> and, because the law so fixes the time where it is not specified, parol evidence is inadmissible to show a different time.<sup>2</sup> If time is mentioned at all, it must be certain and definite. Thus, an order payable on the sale of "certain carriages" is not negotiable;<sup>3</sup> or "as soon as circumstances will permit;"<sup>4</sup> or "thirty days after the arrival of a certain ship;"<sup>5</sup> or "when he is twenty-one years of age;"<sup>6</sup> because the contingency may never happen. But if a time is specified which must arrive, its distance is not material;<sup>7</sup> and it is held that any uncertainty which the law makes certain, by construing it as a reasonable time, is not incompatible with negotiability;<sup>8</sup> though so loose an application of a rule as is made in these two cases would seem to render it useless. If a day is specified with an alternative, the day specified is held to be the ultimate day.<sup>9</sup>

7. *An instrument is not negotiable unless payable to somebody;*<sup>10</sup> and it must not, it seems, be payable to one or the other of two persons named alternatively.<sup>11</sup> Notes made payable to the order of the maker or of a fictitious person have, when negotiated, the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer;<sup>12</sup> but a payee may be made out by construction with-

<sup>1</sup> Wheeler vs. Warner, 47 N. Y. 519; Sackett vs. Spencer, 29 Barb. 180; Peets vs. Bratt, 6 id. 662; Cornell vs. Moulton, 3 Den. 12, 13; Gaylord vs. Van Loan, 15 Wend. 308; Lake Ontario R. Co. vs. Mason, 16 N. Y. 451.

<sup>2</sup> Thompson vs. Ketcham, 8 Johns. 189. See Wright vs. Whitely, 40 Barb. 235, 240.

<sup>3</sup> DeForest vs. Frary, 6 Cow. 151.

<sup>4</sup> Salinas vs. Waight, 11 Tex. 572.

<sup>5</sup> Palmer vs. Pratt, 2 Bing. 185.

<sup>6</sup> Kelley vs. Hemmingway, 13 Ill. 604.

<sup>7</sup> Cota vs. Buck, 48 Mass. 588; Colehan vs. Cooke, Willes, 393, 396.

<sup>8</sup> Capron vs. Capron, 44 Vt. 412; Ubsdell vs. Cunningham, 22 Mo. 124.

<sup>9</sup> Stevens vs. Blount, 7 Mass. 240; Goodloe vs. Taylor, 3 Hawks (N. C.), 458.

<sup>10</sup> Evertson vs. National Bank, 66 N. Y. 14, 20; Douglass vs. Wilkeson, 6 Wend. 637; Brown vs. Gilman, 13 Mass. 158. See White vs. Joy, 13 N. Y. 83, 85.

<sup>11</sup> Osgood vs. Pearsons, 70 Mass. 455; Walrad vs. Petrie, 4 Wend. 575; Blankenhagen vs. Blundell, 2 B. & Ald. 417.

<sup>12</sup> 1 Rev. Stat. 768, § 5. See Irving Nat. Bank vs. Alley, 79 N. Y. 536.

out being directly named as payee: thus, "Received of A. £100, which I promise to pay on demand," is regarded as sufficient;<sup>1</sup> and an instrument payable to "order of bills payable," like one payable to the order of a fictitious payee, is payable to bearer.<sup>2</sup> And the elasticity of construction in the cases is illustrated in *United States vs. White*,<sup>3</sup> where a note made payable to the *order of the person who should thereafter endorse the same* was declared negotiable; but it seems there is no fiction to save a note made payable "to the estate of M. L., deceased."<sup>4</sup>

8. *Negotiable words are essential to the negotiability of an instrument*, such as "to A. or order," or "to bearer," or their equivalent. This is in accordance with the familiar rule that contracts must be construed according to their terms. And accordingly a note payable to A. simply is not negotiable;<sup>5</sup> nor is a note payable to the bearer A.<sup>6</sup> Where a note was made "payable and negotiable at the Kensington Bank," it was held to be negotiable there, and in the first instance there only.<sup>7</sup> A bond issued by a county in aid of a railroad company set forth that the county was indebted to the railroad company, "or the holder hereof, if this bond is transferred by the signature of the president of said company." The bond was endorsed "for value received this bond is transferred to bearer;" which indorsement was signed by the president of the company mentioned. It was held that the bond was a negotiable instrument.<sup>8</sup>

9. *Delivery of an instrument is essential to its negotiability*, because in fact it has no legal inception until it is delivered;<sup>9</sup>

<sup>1</sup> *Green vs. Davies*, 4 B. & C. 235; *Ashby vs. Ashby*, 3 Moo. & P. 186.

<sup>2</sup> *Willeys vs. Phoenix Bank*, 2 Duer, 121; *Stevens vs. Strang*, 2 Sandf. 138.

<sup>3</sup> 2 Hill, 59.

<sup>4</sup> *Lyon vs. Marshall*, 11 Barb. 241.

<sup>5</sup> *Richards vs. Warring*, 39 Barb. 42.

<sup>6</sup> *Warren vs. Scott*, 32 Iowa, 22.

<sup>7</sup> *Raymond vs. Middleton*, 29 Pa. St. 529.

<sup>8</sup> *County of Wilson vs. Third Nat. Bank*, 23 Alb. L. J. 397.

<sup>9</sup> *Marvin vs. McCullum*, 20 Johns.

and so long as the maker has it under his own control he may change his mind and obliterate his signature, or otherwise destroy the instrument.<sup>1</sup>

In *Cooke vs. The United States*,<sup>2</sup> certain Treasury notes had been printed, stamped, and sealed by the proper agents of the government, but they had not been issued; but an innocent purchaser of them was held to be protected. And though the decision of Blatchford, J., holding differently from this, was reversed by the Supreme Court, there were so many dissenting voices in that court that it would be difficult to say upon which side is the weight of authority. Waite, C. J., was of opinion that as soon as the Treasury notes in question received the impression of all the plates and dies necessary to perfect their form, they were, like coins in the mint, ready for circulation and use; and that no official act of putting them in circulation was necessary to make them binding on the government as negotiable instruments. There is no doubt that genuine Treasury notes form part of the negotiable commercial paper of the country,<sup>3</sup> and that when the United States become parties to commercial paper they incur just the same responsibilities as private persons.<sup>4</sup> Among private persons it is well settled that delivery of commercial paper by its maker is essential to its negotiability;<sup>5</sup> in fact, it has no legal inception until such delivery. No reason is obvious why the government should not be as free as a private person as to the undertakings it will assume, except a decided and commendable disposition on the part of the courts to throw every protection around the character of a *bona fide* purchaser, and in cases of doubt to lean in favor of the latter.

288; *Lansing vs. Gaine*, 2 id. 300; <sup>3</sup> *Vermilye vs. Express Co.* 21 Wall. Smith vs. Wyckoff, 3 Sandf. Ch. 77; 138.

*Howe vs. Ould*, 28 Gratt. 1.

<sup>1</sup> *Cox vs. Troy*, 5 B. & Ald. 474.

<sup>4</sup> *United States vs. Bank of Metropolis*, 15 Pet. 377; *The Floyd Acceptances*, 7 Wall. 557.

<sup>2</sup> 91 U. S. 389, reversing 12 Blatchf. 43.

<sup>5</sup> *Supra*.

A nice question as to the liability of a maker on a note which had no valid inception was decided in *Eastman vs. Shaw*.<sup>1</sup> The maker, defendant, executed his note and put it into the payee's hands as evidence to others of his willingness to take a share in a company. No company was formed, but the note was sold by the payee at a discount greater than lawful interest. Held, that the note had no inception until the sale, and was usurious and void.

(d.) *Enumeration of Negotiable Instruments.*

Having thus briefly stated the fundamental elements necessary to constitute negotiability, we proceed to enumerate the principal instruments which the courts and the statutes have declared negotiable.

1. *Bills of Exchange and Promissory Notes.*

These instruments, if in negotiable form, are now negotiable by the law-merchant, and the force of statute throughout this country and the leading commercial countries of Europe. It would be a work of supererogation to give them any general treatment here. On demanding and protesting a stock note, the collaterals must be produced or at hand.<sup>2</sup>

2. *Bank-notes.*

A bank-note or bank-bill is in form and substance a promissory note of an incorporated bank, payable to bearer on demand.<sup>3</sup> Being payable to bearer, it passes from hand to hand by delivery, possession alone being sufficient evidence of title; it will therefore be no defence against the holder of a bank-note that he had the means of knowing it was stolen, and did not inform himself.<sup>4</sup> And such notes cannot

<sup>1</sup> 65 N. Y. 522.

<sup>2</sup> *Ocean Nat. Bank vs. Fant*, 50 N. Y. 475.

<sup>3</sup> *Commonwealth vs. Simonds*, 80

Mass. 59; *Commonwealth vs. Thomas*, 76 id. 483.

<sup>4</sup> *Miller vs. Race*, 1 Burr. 452.

<sup>5</sup> *Raphael vs. Bank of England*, 17 C. B. 161.

be followed by their owner into the hands of a *bona fide* holder for value.<sup>1</sup>

In England, in the case both of stolen bank-notes as well as of other stolen negotiable instruments, the holder must show that he acquired them in the ordinary course of business and without notice.<sup>2</sup>

In the United States, in the case of stolen bank-notes, privity in the fraud or complicity in the offence must first be brought home to the holder, though the rule is the same as in England as to other stolen negotiable paper.<sup>3</sup>

### 3. Checks.

The subject of checks is one of great importance to Stock-brokers, and will justify a more extended treatment of the law upon the subject than any other class of negotiable instruments.

Checks are in the nature of inland bills;<sup>4</sup> but a check payable in a particular kind of funds, as bank-bills, is not negotiable,<sup>5</sup> the rule being that the negotiability of checks is defeated by the same causes which defeat the negotiability of bills and notes in general.<sup>6</sup> Crossing a check with the name of a banker through whom it is intended the check shall be paid, according to the English custom, does not affect its negotiability.<sup>7</sup>

So, writing the word "mem." upon a check, as denoting that it is given simply as an evidence of debt, does not affect its negotiability or alter the right of the holder to present it at once to the bank for payment.<sup>8</sup> But if the bank had knowl-

<sup>1</sup>Lowndes vs. Anderson, 13 East, 130; Solomons vs. Bank of England, id. 135.

<sup>2</sup>De La Chaumette vs. Bank of England, 9 B. & C. 208.

<sup>3</sup>Worcester Co. Bank vs. Dorchester etc. Bank, 64 Mass. 488; Wyer vs. Dorchester etc. Bank, 64 Mass. 51.

<sup>4</sup>Cruger vs. Armstrong, 3 Johns. Cas. 5; Boehm vs. Sterling, 7 T. R. 424.

<sup>5</sup>Little vs. The Phoenix Bank, 2 Hill, 425.

<sup>6</sup>2 Parsons on Notes and Bills, 58; Little vs. Phoenix Bank, supra.

<sup>7</sup>Bellamy vs. Marjoribanks, 7 Ex. 389; Simmons vs. Taylor, 2 C. B. (n. s.) 528; 4 id. 463; Boddington vs. Schlencker, 4 B. & Ad. 752; Carlan vs. Ireland, 5 El. & Bl. 765.

<sup>8</sup>Dykers vs. The Leather Manufacturers' Bank, 11 Paige, 612.

edge of the purpose for which the word "mem." was placed upon the check, or notice by any other means that the check was not an order for the immediate payment of money, it would not be authorized to pay it. So a check payable "to the order of bills payable" is negotiable as if payable to bearer.<sup>1</sup> But a check payable to the order of a fictitious person is not negotiable.<sup>2</sup>

A check may be defined as being an order or request upon a bank or banker directing or requesting the payment of a sum of money.<sup>3</sup> But checks have many peculiar features of their own, in which they differ from both bills of exchange and promissory notes.<sup>4</sup> They are always drawn on a bank or bankers.<sup>5</sup> They are always supposed to be drawn against funds on deposit with the drawee, and operate as an appropriation of such funds to the amount of the check in favor of the holder.<sup>6</sup> They are never presented for acceptance, but only for payment.<sup>7</sup> They are invariably payable on demand.<sup>8</sup>

A check should always bear some date. The question nat-

<sup>1</sup> *Mechanics' Bank vs. Straiton*, 3 Keyes (N. Y.), 365; *Willets vs. The Phoenix Bank*, 2 Duer, 121.

<sup>2</sup> *Willets vs. The Phoenix Bank*, 2 Duer, 121; *Vere vs. Lewis*, 3 T. R. 183; *Minet vs. Gibson*, id. 481. But see p. 500, n. 4, 6.

<sup>3</sup> 2 *Daniel on Negotiable Instruments*, 528, and note; 2 *Parsons on Notes and Bills*, 57; *Bouvier's Law Dict. tit. "Check."*

<sup>4</sup> *Story on Promissory Notes*, § 489; *Harker vs. Anderson*, 21 Wend. 372; *Merchants' Bank vs. State Bank*, 10 Wall. 647; *Espy vs. Bank of Cincinnati*, 18 Wall. 620.

<sup>5</sup> *Story on Promissory Notes*, § 489; *Champion vs. Gordon*, 70 Pa. St. 474.

<sup>6</sup> *Story on Promissory Notes*, § 489; 2 *Parsons on Notes and Bills*, 59; 4 *Kent Comm.* p. 549, note (4th ed.); *Brown vs. Lusk*, 4 Yerg. 210; *Morrison vs. Bailey*, 5 Ohio St. 13; *Hoyt vs. Seeley*, 8 Conn. 360; *In re Brown*, 372.

2 *Story*, 502; *Harris vs. Clark*, 3 N. Y. 120; *Planters' Bank vs. Keese*, 7 Heisk. (Tenn.) 200; *Blair vs. Wilson*, 28 Gratt. 170; *Cruger vs. Armstrong*, 3 Johns. Cas. 5; *Chapman vs. White*, 2 Seld. 412; *Little vs. Phenix Bank*, 2 Hill, 425; *Robinson vs. Hawksford*, 9 Q. B. 52.

<sup>7</sup> *Story on Promissory Notes*, § 489; 2 *Parsons on Notes and Bills*, 60, 61; *Planters' Bank vs. Merritt*, 7 Heisk. 199; *Bank of the Republic vs. Mil-lard*, 10 Wall. 152; *Butterworth vs. Peck*, 5 Bosw. 341.

<sup>8</sup> *Brown vs. Lusk*, 4 Yerg. 210; *Ivory vs. The Bank of the State of Missouri*, 36 Mo. 475; *Morrison vs. Bailey*, 5 Ohio St. 13; *Minturn vs. Fisher*, 4 Cal. 36; *Work vs. Talman*, 2 Houst. (Del.) 304; *Bradley vs. Delaplane*, 5 Harring. (Del.) 305; *Bow-en vs. Newell*, 4 Seld. 190; 3 *Kern*. 290; *Harker vs. Anderson*, 21 Wend. 372.



urally arises, if the check is not dated, when is it payable? Morse says that an undated check is never payable;<sup>1</sup> and he thinks that a bank would be fully justified in refusing to pay a check with that deficiency. But Daniel thinks that this is doubtful, and regards it as not unreasonable for the bank to assume a contemporaneous date and pay the check accordingly.<sup>2</sup> There seems to be no direct adjudication on this point.

It may be dated either on, before, or after the day it is drawn or issued. When dated on or before the day it is issued, it is payable immediately upon presentment. When postdated, it is payable on the day it bears date, or any time thereafter. There is no legal difference between a postdated check and a check dated on the day it is issued, except that it is not payable until the day it bears date.<sup>3</sup>

Formerly, in England, postdated checks were invalid by statute;<sup>4</sup> but this statute having been repealed, and a check being no longer required to be stamped like a bill of exchange, such instruments are now legal and valid in England.<sup>5</sup>

In the United States, postdated checks have never been regulated by statute, and they are perfectly legal and proper instruments.<sup>6</sup> They do not cease to be checks by reason of their being postdated, and thereby become bills of exchange and entitled to days of grace. Like all checks, they are not entitled to days of grace, but are payable on the day they bear date.<sup>7</sup> A postdated check falling due on Sunday becomes due the following day, and must be presented for payment on that day to bind the endorser.<sup>8</sup> Postdated checks are different, then, from

<sup>1</sup> Morse on Banking, 253 (2d ed.). Bank vs. Broderick, 10 Wend. 304;

<sup>2</sup> 2 Daniel on Negotiable Instruments, 538. 13 id. 133; Salter vs. Burt, 20 Wend. 205.

<sup>3</sup> Morse on Banking, 372.

<sup>4</sup> 55 Geo. III. c. 184, § 13.

<sup>5</sup> Grant on Banking, 23; Morse on Banking, 372. Mohawk Bank vs. Broderick, 10 Wend. 304; 13 id. 133; Salter vs. Burt, 20 Wend. 205.

<sup>8</sup> Salter vs. Burt, supra.

<sup>6</sup> Morse on Banking, 372; Mohawk

checks payable at a day after date in that they do not lose their character as checks and are not entitled to days of grace.

A check must be drawn upon a bank or bankers, for only then does it purport to be drawn upon an existing fund, for to that class of persons peculiarly belongs the deposit of money payable on demand at the order of the depositor. An order drawn upon a merchant, or other person not a bank or banker, is a draft, or bill of exchange, and not a check within the ordinary or legal meaning of that term.<sup>1</sup>

Although a check purports to be drawn upon a deposit, it is none the less a check because at the time at which it is drawn the drawer has no funds in the hands of the bank. The check may be worthless or fraudulent, but it is nevertheless a check. It is the form of the instrument, and not any latent circumstance, that determines its character as a check.<sup>2</sup>

Whether a check is such an appropriation and assignment of money as to make a gift irrevocable before the money is drawn, or to be the subject of a gift *mortis causa*, it is hardly necessary to consider in this connection, but the better opinion would seem to be that neither a gift *inter vivos* or *mortis causa* is complete by the delivery of a check;<sup>3</sup> but this question is greatly affected by the circumstances of each case. Neither is it such an appropriation of money as would authorize a bank to pay a check after the death of the drawer. A check is not an obligation, but only an order to pay money, and the bank being only the agent of the drawer of the check, the mandate to pay the check is revoked by his death.<sup>4</sup> Neither does the check work such an assignment of funds upon which it is drawn as to authorize the bank to pay the

<sup>1</sup> *Champion vs. Gordon*, 70 Pa. St. 474.

<sup>2</sup> *Blair vs. Wilson*, 28 Gratt. 170.

<sup>3</sup> *Tate vs. Hilbert*, 2 Ves. Jr. 111; *Burke vs. Risley*, 27 La. An. 465. But see *Harris vs. Clark*, 3 N. Y. 93.

<sup>4</sup> *Burke vs. Risley*, *supra*; *Tate vs. Hilbert*, *supra*. But if the bank pay the check before they learn of the death of the drawer, they are discharged (*id.*).

same when prohibited by the drawer.<sup>1</sup> Neither is it such an assignment of funds as to give the payee of the check any preference over the general creditors of the bank in case of its insolvency before the check is presented for payment.<sup>2</sup> But notes or orders to pay over particular debts, drawn upon a special fund, give an equitable lien as against the drawee which may be enforced, but not where drawn upon a general fund.<sup>3</sup> Even where a bank holds in its possession a check upon itself, sent to it by the owner of the check to meet a note payable at the bank, before the bank accepts the check or charges it upon its books against the drawer the check does not work an assignment of the fund *pro tanto* upon which it is drawn, or give the holder of the check any preference over the creditors of the bank in case of its failure before it pays the check.<sup>4</sup> Where it can be shown for what special debt a check is given, such check may *prima facie* be an acknowledgment of debt, and sufficient to take it out of the Statute of Limitations.<sup>5</sup>

A check is never presented for acceptance, but only for payment. And as there is no acceptance, or promise to pay the check by the bank, or drawee, to the payee, or holder of the check, the payee or endorsee can have no claim or action against the drawee upon a refusal of the latter to pay the same.<sup>6</sup> A check is a bill of exchange within the New York

<sup>1</sup> Parsons on Mer. Law, 92; Dykers vs. The Leather Manufacturers' Bank, 11 Paige, 612.

<sup>2</sup> Chapman vs. White, 2 Seld. 412.

<sup>3</sup> Harris vs. Clark, 3 N. Y. 93, and cases cited; Cowperthwaite vs. Sheffield, 3 N. Y. 243; Winter vs. Drury, 1 Seld. 525; Lunt vs. Bank of North America, 49 Barb. 221; Att'y-gen'l vs. Continental Life Ins. Co. 71 N. Y. 325; Duncan vs. Berlin, 60 id. 151; Tyler vs. Gould, 48 id. 682.

<sup>4</sup> Chapman vs. White, 2 Seld. 412.

<sup>5</sup> Spangler vs. McDaniel, 3 Ind. 275.

<sup>6</sup> 2 Parsons on Notes and Bills, 60, 61, and cases cited in note; Planters' Bank vs. Merritt, 7 Heisk. (Tenn.) 199; Bank of the Republic vs. Millard, 10 Wall. 152; Butterworth vs. Peck, 5 Bosw. 341; but see, contra, Munn vs. Burch, 25 Ill. 35.

statute<sup>1</sup> declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance be in writing;<sup>2</sup> accordingly, a verbal promise by a bank to pay a check does not create a cause of action thereon.<sup>3</sup> "The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction."<sup>4</sup> There is no privity of contract between the bank and the holder of the check.<sup>5</sup> The authorities are not all uniform on this subject, but the preponderance of authority is against the liability of the drawee to the holder of the check.<sup>6</sup> Parsons, on Mercantile Law,<sup>7</sup> says: "We have no doubt but that, on correct principles of commercial law, the holder should have this right of suing the bank, so long as the bank has funds of the depositor in his possession."

Delay in presenting the check for payment is at the holder's risk; for if the bank fails after he could have got the money on the check, the loss is his.<sup>8</sup>

It may be that, when the bank has charged the check in its books against the drawer, and settled with him on that basis, the holder of the check can recover against the bank, upon the ground that the rule *ex æquo et bono* would apply; as the bank in such a case, having assented to the order, and communicated its assent to the drawer of the check, would be considered as holding the money, thus appropriated, to the use of the holder of the check, and therefore under an implied promise to him to pay it on demand.<sup>9</sup> But in the ordinary course of business a claim under such circumstances would not arise, as

<sup>1</sup> 1 Rev. Stat. 768, § 6.

<sup>2</sup> 2 Parsons on Notes and Bills, 61,

<sup>3</sup> Risley vs. Phenix Bank, 83 N. Y. 318.

and cases there cited.  
<sup>7</sup> P. 91.

<sup>4</sup> Id.

<sup>5</sup> Robinson vs. Hawksford, 9 Q. B.

<sup>6</sup> Bank of the Republic vs. Millard, 52.  
10 Wall. 152.

<sup>9</sup> Bank of the Republic vs. Millard, 10 Wall. 152.

<sup>8</sup> Id.

the check would be paid before the charge against the drawer had been made on the books; but in the case in which this distinction was made the bank paid the check on a forged endorsement, and was subsequently sued by the true owner.<sup>1</sup> Where the bank, however, certifies the check to be "good," it then enters into an engagement similar to that of acceptance, and becomes primarily liable to pay the check to the holder.<sup>2</sup> And the certification of the bank not only makes it the principal debtor, liable to pay the check, but absolutely discharges the drawer.<sup>3</sup> Where the payee of a check deposits the same in the bank on which it is drawn, and receives credit therefor in his pass-book, it is a payment, although the drawer of the check has no funds at the time.

"Under ordinary circumstances, the bank upon which a check is drawn owes no duty to the holder of it, and is liable to no action by him for refusing to pay the check, though it has sufficient funds therefor."<sup>4</sup>

It is held in some cases that the bank exercises a trust in receiving the deposit of the depositor, and undertakes to pay all checks, etc.<sup>5</sup> But a bank, in receiving a deposit, does not act in a fiduciary capacity: the deposit simply creates the legal relation of debtor and creditor.<sup>6</sup> But Parsons thinks that, in case of a wanton refusal on the part of the bank to pay, the bank would be liable.<sup>7</sup>

<sup>1</sup> Bank of the Republic vs. Millard, 10 Wall. 162.

<sup>2</sup> 2 Daniel on Negotiable Instruments, 556; Andrews vs. German Nat. Bank, 9 Heisk. 211; Merchants' Bank vs. State Bank, 10 Wall. 647; First Nat. Bank of Jersey City vs. Leach, 52 N. Y. 350.

<sup>3</sup> First Nat. Bank of Jersey City vs. Leach, *supra*.

<sup>4</sup> 2 Parsons on Bills and Notes, 61, *note*; Bellamy vs. Marjoribanks, 7 Ex. 404 (*obiter*); Mandeville vs. Welch, 5 Wheat. 286. Not the case

of a check. . Intimates that an obligation to accept may be implied from the custom of trade or the course of business between the parties (Warwick vs. Rogers, 5 M. & G. 340). The banker was directed not to pay the bill.

<sup>5</sup> Attempted to be sustained by cases like Weston vs. Barker, 12 Johns. 276, etc.

<sup>6</sup> Bank of Republic vs. Millard, 10 Wall. 152; Foley vs. Hill, 2 H. L. Cas. 28.

<sup>7</sup> 2 Parsons on Notes and Bills, 60, 61; *id.* on Mercantile Law, 91.

Money deposited with a banker is, to all intents and purposes, the money of the banker.<sup>1</sup>

If the element of a trust cannot be introduced, then it would seem that the bank may absolutely, without any good cause, refuse to pay the check so far as any rights of the payee or holder against the bank is concerned.<sup>2</sup> But the depositor has an action against the bank for its refusal to pay his check upon an implied promise to do so; and there cannot be the anomaly of a right of action upon one promise for the same thing in two persons.<sup>3</sup> The depositor has an action against the bank for its refusal to honor his checks.<sup>4</sup> The action may be either in assumpsit upon the implied contract to pay all checks drawn by the depositor, provided he has moneys belonging to him sufficient to pay the same, or it may be in tort.<sup>5</sup> The plaintiff in such a case is entitled at least to nominal damages, although no actual damage be proved.<sup>6</sup> But, although no special damage is proved, the jury may assume that the depositor whose checks are refused payment, he being a trader, has sustained damage, and may award substantial damages.<sup>7</sup>

Although a customer of a bank deposits with it a check wrongfully received by him, nevertheless it creates the relation of debtor and creditor between the bank and the depositor; and the bank is indebted to him for so much money lent, or had and received to his use, and he may recover the same from the bank in a proper action.<sup>8</sup>

One of the peculiar features of a check is that it is invaria-

<sup>1</sup> *Foley vs. Hill*, 2 H. L. Cas. 28; 415; *Rolin vs. Steward*, 14 C. B. 595; *Bank of the Republic vs. Millard*, 10 Wall. 152; *Parker vs. Merchant*, 1 Wall. 152; *Whitaker vs. Bank of Phillips*, Ch. 360.

<sup>2</sup> *Bank of the Republic vs. Millard*, 10 Wall. 152.

<sup>3</sup> *Id.*

<sup>4</sup> *Marzetti vs. Williams*, 1 B. & Ad.

<sup>5</sup> *Marzetti vs. Williams*, *supra*.

<sup>6</sup> *Id.*

<sup>7</sup> *Rolin vs. Steward*, 14 C. B. 595.

<sup>8</sup> *Tassell vs. Cooper*, 9 id. 509.

bly payable on demand, and in this respect differs from promissory notes and bills of exchange.<sup>1</sup> And it has been held that an order upon a bank payable at a day after its date is not a check, but a bill of exchange, and entitled to days of grace, like other bills.<sup>2</sup> And it makes no difference whether the check or instrument be payable on a precise day named or at so many days after sight; it is equally a bill of exchange, and not a check.<sup>3</sup>

But there are some decisions entitled to great weight, because of the recognized learning of the judges by whom they were rendered, which take a different view of this subject, and hold that payment on demand is not a necessary feature of a check, and that a check or draft on a bank or bankers is none the less a check because it directs the payment at a day after date, and that therefore it is not entitled to days of grace like a bill of exchange.<sup>4</sup> And this was also held in a case where the check or instrument was payable at so many days after sight.<sup>5</sup> But although there is considerable conflict of opinion in the cases as to the category in which an instrument drawn in the ordinary form of a check, but payable after date, should be placed, the weight of authority seems to be to regard it as a bill of exchange and entitled to days of grace, and governed by all the rules appertaining to such instruments.<sup>6</sup>

In one case, in the Supreme Court of Ohio,<sup>7</sup> a middle

<sup>1</sup> Harker vs. Anderson, 21 Wend. 372.

<sup>2</sup> Brown vs. Lusk, 4 Yerg. 210; Ivory vs. the Bank of the State of Missouri, 36 Mo. 475; Morrison vs. Bailey, 5 Ohio St. 13; Minturn vs. Fisher, 4 Cal. 36; Work vs. Tatman, 2 Houst. (Del.) 304; Bradley vs. Delaplaine, 5 Harr. (Del.) 305; Bowen vs. Newell, 4 Seld. 190; 3 Kern. 290.

<sup>3</sup> Henderson vs. Pope, 39 Ga. 361; Bowen vs. Newell, 4 Seld. 190; Bradley vs. Hamilton, 5 Harr. (Del.) 305.

<sup>4</sup> In re Brown, 2 Story, 502; Champion vs. Gordon, 70 Pa. St. 474; Bowen vs. Newell, 5 Sandf. 326, rev'd in 4 Seld. 190.

<sup>5</sup> Westminster Bank vs. Wheaton, 4 R. I. 30.

<sup>6</sup> 2 Daniel on Negotiable Instruments, 536, § 1574; 2 Parsons on Notes and Bills, 68, 69; Morse on Banking, 262 (2d ed.).

<sup>7</sup> Andrew vs. Blachly, 11 Ohio St. 89.

ground was taken, and it was there held that the circumstance that a draft for money, otherwise in the usual form of a check, is payable on a future specified day, is *prima facie* but not conclusive evidence that the instrument is a bill of exchange, and as such entitled to days of grace; and that where it is shown that such an instrument is drawn upon a bank or banker and was intended by the parties as an absolute transfer and appropriation of so much of a fund against which it was drawn, it is a check, and not a bill of exchange.

But such a rule is open to the objection that it determines the nature of negotiable instruments, not by their visible character and form, but by undisclosed circumstances which can only be determined by investigation. In some cases, again, it has been attempted to determine the character of checks of this description by showing the usage which has prevailed at the localities where they are made payable.

In the case of *Bowen vs. Newell*, in the Court of Appeals of New York, it was held that the usage of the bank upon which the check in that case was drawn, and other banks in the State of Connecticut, where such bank was located, was not admissible in evidence to control the rules of law relative to such paper. But when upon a new trial of the case it was shown that it was the *universal* custom of all the banks of Connecticut to regard checks payable after date as not entitled to days of grace, the court held that the law of Connecticut must prevail.<sup>1</sup>

The holder of a check has no preference of payment over checks subsequently drawn. He gets no specific lien upon the funds by reason of his check having been drawn first. The bank will not undertake to settle the question of preferences, and may pay over all the fund to the depositor and let

<sup>1</sup> 4 Seld. 190; 3 Kern. 290.



him distribute it as he pleases.<sup>1</sup> Checks are not payable in the order of priority in which they are given, but in that in which they are presented.<sup>2</sup> Neither will a verbal acceptance of the check by the cashier of the bank affect this priority and give any preference to the accepted check.<sup>3</sup> Neither will a check thus verbally accepted have a preference over a prior trustee process.<sup>4</sup> Mere notice that a party holds a check without presentment and demand will not bind the bank; and if there be funds when notice is thus given without presentment for payment by the holder, and in the meantime other checks of the same drawer are presented and the fund paid out upon them, the bank is not liable.<sup>5</sup>

The relation of a bank to its depositor is that of debtor and creditor. And where the depositor draws on the bank, and the holder of the check so drawn by such depositor presents it to the bank for payment, and the bank takes the check and debits it to the depositor's account, it then in turn becomes the debtor of the holder of the check; but by so debiting the depositor, and drawing a draft upon some other bank, in favor of the holder, in payment of the check, it does not appropriate and set apart any particular part of its funds for the payment of such draft, so as to impress such fund with a trust, and so as to give the holder of such check any preference over the other creditors of the bank, as against a receiver.<sup>6</sup> A check is not payment, but merely evidence of a debt from the drawer.<sup>7</sup> But it may become payment by the laches of the holder.<sup>8</sup> Under the statute respecting lost notes and bills

<sup>1</sup> *Dykers vs. The Leather Manufacturers' Bank*, 11 Paige, 612.

<sup>2</sup> *Bullard vs. Randall*, 67 Mass. 605.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *People vs. The Merchants and Mechanics' Bank*, 78 N. Y. 269.

<sup>7</sup> *Taylor vs. Wilson*, 52 Mass. 44; check received upon the surrender

*Johnson vs. Bank of North America*, 5 Robt. 554; *Johnson vs. Weed*, 9 Johns. 310; *Porter vs. Talcott*, 1 Cow. 359, 384; *Olcott vs. Rathbone*, 5 Wend. 490; *Vail vs. Foster*, 4 N. Y. 312; *Turner vs. Bank of Fox Lake*, 4 Ab. (N. Y.) App. 432, 434.

<sup>8</sup> *Taylor vs. Wilson*, *supra*. A

of exchange, a party is entitled to recover upon a lost check, upon proving the contents thereof and tendering a bond of indemnity at the trial, although the loss occurred subsequently to the commencement of the action.<sup>1</sup> As a general rule, a check must be presented for payment before the drawer can be held liable;<sup>2</sup> the drawer undertakes that the drawee shall pay it, and is answerable only in case of his failure.<sup>3</sup>

Where there are no funds in the hands of the drawee at the date of the check (and thence down to the time of payment), no demand or notice is necessary.<sup>4</sup>

Where the drawer has no funds in the bank, nor has made any arrangement by which he has a right to draw the check, and has no reasonable grounds to expect that the same will be honored, the drawing of the check is a fraud, and the holder may bring his action against the drawer without presentment and notice.<sup>5</sup> But where the check is drawn in good faith, want of funds would not perhaps dispense with presentment for payment, for the drawee might pay the check for the honor of the drawer.<sup>6</sup>

Where the drawer withdraws the funds so that the check of a draft is not payment—*Johnson vs. Bank of North America*, 5 Robt. 554; *Darnall vs. Morehouse*, 45 N. Y. 67; *Nunnemaker vs. Lanier*, 48 Barb. 234; *Turner vs. Bank of Fox Lake*, 4 Ab. (N. Y.) App. 434; *Kelly vs. The Second National Bank*, 52 Barb. 328; *Burkhalter vs. The Second National Bank*, 42 N. Y. 538; *First National Bank of Meadville vs. Fourth National Bank*, 77 id. 320.

<sup>1</sup> 2 Rev. Stat. 652; *Jacks vs. Darrin*, 3 E. D. Smith, 548, 557.

<sup>2</sup> *Brown vs. Lusk*, 4 Yerg. 210; *Harker vs. Anderson*, 21 Wend. 372; *Murray vs. Judah*, 6 Cow. 484; *Cruger vs. Armstrong*, 3 Johns. Cas. 259.

<sup>3</sup> *Murray vs. Judah*, *supra*; *Cruger vs. Armstrong*, *supra*.

<sup>4</sup> *Bickerdicke vs. Bollman*, 1 T. R. 405; *Goodall vs. Dolley*, id. 713; *Walwyn vs. St. Quintin*, 1 Bos. & P. 652; *Sutcliffe vs. McDowell*, 2 Nott & McC. 251; *Edwards vs. Moses*, id. 433; *Foster vs. Paulk*, 41 Me. 425; *Franklin vs. Vanderpool*, 1 Hall, 78; *Hoyt vs. Seeley*, 18 Conn. 353; *Spangler vs. McDaniel*, 3 Ind. 275.

<sup>5</sup> *De Berdt vs. Atkinson*, 2 H. Bl. 336; *Terry vs. Parker*, 6 Ad. & E. 502; *Kinsley vs. Robinson*, 38 Mass. 327; *Foard vs. Womack*, 2 Ala. 368; *Cathell vs. Goodwin*, 1 Har. & G. 468; *Legge vs. Thorpe*, 12 East, 171; *French vs. Bank of Columbia*, 4 Cranch, 141.

<sup>6</sup> *Cruger vs. Armstrong*, 3 Johns. Cas. 5.

cannot be paid, he cannot complain of want of demand and notice.<sup>1</sup>

Where, however, the drawer has funds with the drawee when the check is drawn, and afterwards withdraws the funds by overdrawing his account, that will not excuse demand and notice.<sup>2</sup>

So where the drawer has a fluctuating balance with the drawee, demand and notice are still requisite.<sup>3</sup> And where the drawer has paid part of the check, the holder may sue without proving a demand; for the drawer, by such payment, acknowledges his indebtedness on the check. But the holder cannot give credit for a part and sue for the rest without a previous demand, for that would enable him to take advantage of his own neglect.\*

So where one person receives from another his check on a bank as evidence merely of the amount due to him, if the person so receiving it fraudulently passes it away to a third person in payment of an existing debt, the holder of such check, upon discovering the fraud, is not bound to present it at the bank for payment, especially where he has notice of the facts from the maker, and the maker has stopped payment of the check.<sup>5</sup>

So where the drawer directs the drawee not to pay the check, it is not necessary that the check should be presented and notice given.<sup>6</sup>

Where the drawer of a check is informed that a demand

<sup>1</sup> Sutcliffe vs. McDowell, 2 Nott & McC. 251; Conroy vs. Warren, 3 Johns. Cas. 259; Spangler vs. McDaniel, 3 Ind. 275.

<sup>2</sup> Edwards vs. Moses, 2 Nott & McC. 433.

<sup>3</sup> Blackhan vs. Doren, 2 Campb. 503; Legge vs. Thorpe, 12 East, 171; Sutcliffe vs. McDowell, 2 Nott & McC. 251.

<sup>4</sup> Levy vs. Peters, 9 Serg. & R. 125.

<sup>5</sup> Devoe vs. Moffat, Anthon's N. P. 220.

<sup>6</sup> Lilley vs. Miller, 2 Nott & McC. 257; Devoe vs. Moffat, supra; Jacks vs. Darrin, 3 E. D. Smith, 557; Purchase vs. Mattison, 6 Duer, 587. As to how the demand may be proved, see Brown vs. Lusk, 4 Yerg. 210.

was made and payment refused, a promise to arrange it is not a waiver of the demand, if in fact none were made.<sup>1</sup>

As a general rule, the circumstances which will excuse a demand will also preclude the necessity of notice of the dishonor of the check. But it may be that notice is not necessary even where a demand is requisite, as where the check is dishonored for want of funds.<sup>2</sup>

Where the drawer has no funds at the time the check is drawn, and no reasonable grounds to expect that the same will be honored, notice may be dispensed with.<sup>3</sup> And the grounds of expectation that the check will be honored must be more than an idle hope or remote probability.<sup>4</sup> What are "reasonable grounds" for such expectation upon undisputed facts, is a question for the court.<sup>5</sup>

Want of notice will not discharge the drawer where he has not been injured by the neglect.<sup>6</sup>

Where the check is drawn for the accommodation of another, and no fraud can be imputed to the drawer on account of his reasonable expectations that the bill would be paid by the party for whose accommodation it was drawn, if the check is dishonored for the want of funds the drawer is entitled to notice.<sup>7</sup>

In respect to the endorser, there can scarcely be a case in which notice to him may be dispensed with.<sup>8</sup> But where the omission of demand and notice cannot possibly operate to the injury of the endorser, he will not be discharged; but such

<sup>1</sup> Brown vs. Lusk, 4 Yerg. 210.

<sup>5</sup> Cathell vs. Goodwin, *supra*;

<sup>2</sup> Cruger vs. Armstrong, 3 Johns. Cas. 5.

Legge vs. Thorpe, *supra*.

<sup>3</sup> Cathell vs. Goodwin, 1 Har. & G. 468; Legge vs. Thorpe, 12 East, 171; Franklin vs. Vanderpool, 1 Hall, 78; French vs. Bank of Columbia, 4 Cranch, 141.

<sup>6</sup> Hoyt vs. Seeloy, 18 Conn. 353; Kemble vs. Mills, 1 Mau. & Gr. 757.

<sup>7</sup> Brown vs. Lusk, 4 Yerg. 210.

<sup>8</sup> Cathell vs. Goodwin, 1 Har. & G. 465; Legge vs. Thorpe, 12 East, 171.

<sup>8</sup> Sutcliffe vs. McDowell, 2 Nott & McC. 251; Scarborough vs. Harris, 1 Bay (S. C.), 177.

injury is presumed until the plaintiff, by proof on his side, removes all chance of injury.<sup>1</sup>

Should the endorser promise to pay the check without knowledge of the laches of the endorsee, want of notice will not thereby be waived.<sup>2</sup>

Where, however, there is no presentment of the check and no notice, there is a presumption of injury to the drawer. But this presumption may be rebutted. It may be rebutted by showing that the drawer had no funds, or that he had withdrawn the funds.<sup>3</sup> And the same presumption would exist in respect to an endorser.<sup>4</sup> The burden of showing a demand within a reasonable time, in order to hold the endorser, is on the plaintiff.<sup>5</sup>

In respect to the diligence with which a check should be presented in order to charge the drawer or the endorser, the general rule is that it should be presented within a reasonable time.<sup>6</sup> This is especially true in respect to an endorser. But in respect to the drawer, the check may be presented at any time before suit, and the drawer still be liable thereon, unless he has been damaged by the delay.<sup>7</sup> Mere delay in presenting a check does not discharge the drawer where he suffers no injury thereby.<sup>8</sup> What amounts to due diligence in all cases

<sup>1</sup> Smith vs. Miller, 52 N. Y. 545.

<sup>2</sup> Goodall vs. Dolley, 1 T. R. 713.

<sup>3</sup> Franklin vs. Vanderpool, 1 Hall, 78; Healy vs. Gilman, 1 Bosw. 235; Eichelberger vs. Finley, 7 Har. & J. 381.

<sup>4</sup> Smith vs. Miller, supra.

<sup>5</sup> Veazie Bank vs. Winn, 40 Me. 60.

<sup>6</sup> 2 Parsons on Notes and Bills, 71; Mohawk Bank vs. Broderick, 10 Wend. 304; 13 id. 133; Veazie Bank vs. Winn, supra; Murray vs. Judah, 6 Cow. 490; Gough vs. Staats, 13 Wend. 549; Elting vs. Brinkerhoff,

2 Hall, 459; Conroy vs. Warren, 3 Johns. Cas. 259; Hoyt vs. Seeley, 18 Conn. 353.

<sup>7</sup> Murray vs. Judah, supra; Mohawk Bank vs. Broderick, supra; Gough vs. Staats, 13 Wend. 549; Merchants' Bank vs. Spicer, 6 id. 445; Cromwell vs. Lovett, 1 Hall, 68; Elting vs. Brinkerhoff, 2 id. 1067; 2 Kent Comm. 88 (4th ed.); Little vs. The Phenix Bank, 2 Hill, 425.

<sup>8</sup> Hoyt vs. Seeley, 18 Conn. 353; Kemble vs. Mills, 1 Man. & Gr. 757; Alexander vs. Burchfield, 7 id. 1067; Cowing vs. Altman, 79 N. Y. 167; Harbeck vs. Craft, 4 Duer, 122.

cannot be defined, but must depend upon circumstances.<sup>1</sup> Where the holder is prevented by a state of things beyond his control from presenting the check, a delay is excusable.<sup>2</sup> But where the holder has allowed a long period of time to elapse before presenting the check for payment, the burden is upon him to show that the drawer has not suffered by the delay.<sup>3</sup>

In one case it has been held that the fact of the drawer having drawn from the bank large sums of money after the date of the check afforded an inference that the drawer had not suffered by the delay, and was sufficient to throw the *onus probandi* of actual damages on the defendant.<sup>4</sup>

What is reasonable time both as to demand and notice is a question for the court where the facts are undisputed, or where they have been determined by the jury.<sup>5</sup> It is sufficient if a check, drawn upon one day, be presented for payment upon the next succeeding day within the usual banking hours, where the payee resides in the immediate vicinity of the place of payment, as in the same city or town.<sup>6</sup> As a rule, the holder of a check is not entitled to one day more for presenting it by passing it through his bankers.<sup>7</sup> Where the holder lives in a post-town, the check should be sent by mail the next day.<sup>8</sup> And a banker or other per-

<sup>1</sup> *Moody vs. Mack*, 43 Mo. 210; *Kelly vs. The Second National Bank*, Conroy vs. Warren, 3 Johns. Cas. 259. 52 Barb. 328.

<sup>2</sup> *Moody vs. Mack*, *supra*.

<sup>3</sup> *Little vs. The Phoenix Bank*, 2 Hill, 425; *Conroy vs. Warren*, 3 Johns. Cas. 259; *Franklin vs. Vanderpool*, 1 Hall, 78; *Healy vs. Gilman*, 1 Bosw. 235; *Eichelberger vs. Finley*, 7 Har. & J. 381.

<sup>4</sup> *Conroy vs. Warren*, 3 Johns. Cas. 259.

<sup>5</sup> *Moule vs. Brown*, 4 Bing. (N. C.) 266; *Tindal vs. Brown*, 1 T. R. 167; *Conroy vs. Warren*, *supra*; *Mohawk Bank vs. Broderick*, 10 Wend. 304;

<sup>6</sup> *Ritchie vs. Bradshaw*, 5 Colf. 228; *Rickford vs. Ridge*, 2 Campb. 539; *Boddington vs. Schlencker*, 4 B. & Ad. 752; *Moule vs. Brown*, 4 Bing. (N. C.) 266; *Taylor vs. Wilson*, 52 Mass. 44; *Veazie Bank vs. Winn*, 40 Me. 60; *Mohawk Bank vs. Broderick*, 10 Wend. 304; *Cromwell vs. Lovett*, 1 Hall, 68; *Kelly vs. The Second National Bank*, 52 Barb. 328.

<sup>7</sup> *Alexander vs. Burchfield*, 7 M. & G. 1061.

<sup>8</sup> *Moule vs. Brown*, 4 Bing. (N. C.)

son receiving a check for collection by the general post is not bound to present it for payment until the following day.<sup>1</sup>

A check may pass from hand to hand, and a reasonable time to each party receiving the same to present it for payment is allowed; and the next day after receiving it is held to be such reasonable time.<sup>2</sup>

Where a postdated check falls due on Sunday, it is not payable until the following Monday, and a demand on the previous Saturday, and notice thereof, is insufficient to hold the endorser.<sup>3</sup> When, however, a bank or other agent receives a draft for collection, and takes the check of the drawee in payment of the same, instead of money, the agent must present the check for payment the same day on which it is received, in order to discharge his full duty to his principal, and relieve himself from all liability in case of the failure of the bank.<sup>4</sup>

The National Bank of Crawford County, at Meadville, Pa., made and delivered to the First National Bank of Meadville, at the same place, a sight-draft upon C., P. & Co., bankers in the city of New York, and the First National Bank endorsed the same, and sent it by mail to the Fourth National Bank of New York for collection. That bank received the draft on the morning of the 26th of March, and on the same morning it was presented to the drawees for payment. It received in payment the check of the drawees upon the New York bank, where they kept their account, and delivered up the draft. The collecting bank sent the check through the Clearing-

266; Rickford vs. Ridge, 2 Campb. Mohawk Bank vs. Broderick, 10 557; Mohawk Bank vs. Broderick, Wend. 304; In re Brown, 2 Story, 511, 512. But see, contra, Story on 10 Wend. 304.

<sup>1</sup> Rickford vs. Ridge, 2 Campb. Promissory Notes, § 494. 537; Veazie Bank vs. Winn, 40 Me. 60. <sup>3</sup> Salter vs. Burt, 20 Wend. 205.

<sup>2</sup> Taylor vs. Wilson, 52 Mass. 44; <sup>4</sup> Nunnemaker vs. Lanier, 48 Barb. Veazie Bank vs. Winn, 40 Me. 60; 234; First National Bank of Mead- Williams vs. Smith, 2 B. & Ald. 496; ville vs. Fourth National Bank, 77 Rickford vs. Ridge, 2 Campb. 537; N. Y. 320.

house, and it was presented for payment the next day. On that day, the 27th of March, C., P. & Co. failed, and the bank refused to pay the check. The collecting bank then returned the dishonored check to C., P. & Co., and received back the draft, and caused the same to be duly protested for non-payment. The evidence showed that the account of C., P. & Co. was largely overdrawn on the 26th of March. But the bank had been in the habit, for a long time, of allowing them to overdraw their account during any day. And all the checks of C., P. & Co. which were presented on the 26th were paid, including some that were drawn after the one in question. The court held that there was a justifiable conclusion that this check would have been paid if properly presented, and that the collecting bank was liable in damages for any injury arising from its want of diligence. But as the draft had been presented and protested with sufficient diligence to cause the drawer thereof to be charged, and no special damage was shown, the damages were only nominal. There was nothing in the case to show that the collecting bank had any knowledge of the probable failure of C., P. & Co. the next day, or any knowledge respecting their circumstances.

But presentment on the following day would be sufficient to hold the drawer of the draft.<sup>1</sup> Though in a case in the New York Court of Appeals, where the payee of a draft undertook its collection himself, and received the check of the drawee in payment, which he neglected to present for payment until the following day—having deposited it in his own bank for collection through the Clearing-house—and, before presentment, the drawer of the check failed, it was held that the check had not been presented with sufficient dili-

<sup>1</sup> *Turner vs. Bank of Fox Lake*, 4 538; *First National Bank of Mead-Ab. (N. Y) App. 434*; *Burkhalter vs. ville vs. Fourth National Bank*, 77 *The Second National Bank*, 42 N. Y. id. 320.



gence to charge the drawer upon the draft, or for the original indebtedness for which the same was given.<sup>1</sup>

It is difficult to reconcile this case with those cases in the same court which hold that presentment of the check the following day, when it is received by an agent employed to collect the draft, is sufficient to hold the drawer of the draft. For it is a well-recognized principle of law that a principal cannot discharge himself from a duty by employing an agent.

Where a check received in payment of a draft is dishonored, the proper course to pursue, in order to hold the drawer of the draft, is to surrender the check and demand back the draft; then make a second demand of payment, and, upon refusal, to give due notice of its dishonor to the parties entitled to the same.<sup>2</sup>

Checks payable to bearer are transferable by mere delivery,<sup>3</sup> and they are negotiable, and preserve their negotiable quality by being transferred in that manner. Although a check payable to a person named, or bearer, passes by delivery, yet if the person named as payee endorses it, *animo indorsandi*, he incurs all the *liabilities* of an endorser of a negotiable instrument.<sup>4</sup> Checks payable to order, however, are generally transferred by endorsement, and can only be negotiated by endorsement, except where they have been endorsed in blank, and then they may pass from hand to hand and preserve their negotiability by mere delivery. But checks payable to order, like other choses in action, are also transferable by parol with manual delivery.<sup>5</sup> But a check payable to order can

<sup>1</sup> Smith vs. Miller, 52 N. Y. 545.

<sup>4</sup> Keene vs. Beard, 8 C. B. (n. s.)

<sup>2</sup> Turner vs. Bank of Fox Lake, 4 372.

Ab. (N. Y.) App. 434; Burkhalter vs. Second National Bank, 42 N. Y. 538; Smith vs. Miller, 52 id. 545.

<sup>5</sup> Canfield vs. Monger, 12 Johns. 346, 347; Taylor vs. Bates, 5 Cow. 376; Freund vs. Importers and

<sup>3</sup> 2 Parsons on Notes and Bills, Traders' National Bank, 76 N. Y. 58; Conroy vs. Warren, 3 Johns. Cas. 352. 260.

only be negotiated by endorsement, and its negotiability can only be preserved by that means, except where it has been endorsed in blank;<sup>1</sup> and the transferee, in such a case, only acquires the rights he would have taken had the instrument not been negotiable at the start—that is, only the rights of the payee in the same at the time of the assignment.<sup>2</sup> And an accommodation check transferred in the same manner would be valid in the hands of a transferee against the maker where the payee took it without restriction as to its use.<sup>3</sup> The certification of a check so delivered would have all the legal effect which the same certification would have had, had it been endorsed by the payees.<sup>4</sup>

Checks, being always payable on demand, cannot properly be said to be overdue until presentment for payment has been made, and their payment refused. But, in respect to the title of a transferee taking a check some time after its date, it may be said to be always overdue, so as to charge him with the duty of inquiring into the title of the party from whom he received the check, if such a time has elapsed between its date and the transfer as should excite his suspicion.<sup>5</sup> It is not, however, overdue, like a bill of exchange or promissory note, which is transferred after the date when the same is payable; thus having a fixed date, after which a party receiving it takes it at his peril. It cannot be laid down as a matter of law that a party taking a check after any fixed time from its date does so at his peril.<sup>6</sup> And the mere fact of taking a check six days after it bore date has been held not of itself to defeat the title of the holder to the moneys paid upon

<sup>1</sup> *Freund vs. Importers and Traders' National Bank*, 76 N. Y. 352.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 2 *Parsons on Notes and Bills*, 388.

79; *Down vs. Halling*, 4 B. & C. 330; *Brooks vs. Mitchell*, 9 M. & W. 15; *Serrell vs. Derbyshire Railway Co.*, 9 C. B. 811.

<sup>6</sup> *Rothschild vs. Corney*, 9 B. & C.

the same at the suit of the drawer, from whom the check had been obtained by fraud, but was only a circumstance to be taken into consideration by the jury in determining whether the check was taken under such circumstances as ought to have excited the suspicion of a prudent man.<sup>1</sup>

But in another case it was held that, where a check came to the hands of a party five days after its date, it was to be treated in the same light as a bill of exchange overdue; and that it was incumbent upon the party taking the check to show that the party from whom he took it had a good title.<sup>2</sup> The question whether the party taking the check has been guilty of laches or bad faith must be determined by the jury upon all the circumstances of the case.<sup>3</sup> But where the facts are undisputed, the question whether the transferee has become possessed within a reasonable time after its date is a question of law for the court.<sup>4</sup>

A check on a bank in Boston was sent by mail to Rochester in New York, and there bought four days after its date, and was presented for payment two days afterwards. Held, that the buyer was not subject to equities existing between the original parties of which he had no notice, either on the ground that the lapse of time between the date of the check and his purchase of it should have put him upon inquiry, or on the ground of unreasonable delay in making presentment.<sup>5</sup>

Even if a check bearing notarial marks upon it were received for value and in perfect good faith, the title of the holder would not be defeated. The fact that there were marks upon the check showing that it had been protested for

<sup>1</sup> *Rothschild vs. Corney*, 9 B. & C. 870; *Lancaster Bank vs. Woodward*, 388. 18 Pa. St. 357.

<sup>2</sup> *Down vs. Halling*, *supra*.

<sup>4</sup> *Furman vs. Haskin*, 2 Caines,

<sup>3</sup> *Rothschild vs. Corney*, *supra*; 368; *Byles on Bills*, 175.

*Willeys vs. Phenix Bank*, 2 Duer, <sup>5</sup> *First National Bank vs. Harris*, 121; *Goodman vs. Harvey*, 4 Ad. & E. 108 Mass. 514.

non-payment would only be evidence for the jury as to whether the holder had taken the same in good faith. It would seem that, even if the party taking the check were guilty of gross negligence, his title would be good unless such gross negligence were evidence of *mala fides*.<sup>1</sup> But the time between the date and the transfer may be so great as to warrant the court to determine as matter of law that the transferee took the check under such circumstances as to give him no better title than the person from whom he received it.<sup>2</sup>

Where a bank paid a check more than a year after its date, the bank not having any funds of the drawer when it came due, or when it was subsequently paid, but paid it for the credit of the drawer, he having previously paid the check, it was held the bank must bear the loss.<sup>3</sup>

The general rule applicable to bills of exchange, that a party taking it after it is due takes it subject to all the equities to which the party from whom he takes it is liable, is also applicable to checks.<sup>4</sup> Where, however, the drawer of a check parts with it long after its date, and the original consideration fails, that will not affect the rights of a holder for value, without notice.<sup>5</sup> And if a check payable at a future day is passed away by the payee before its maturity, and the endorsee having, upon taking the check, paid the full amount thereof, transfers it to the plaintiff, the latter is entitled to recover against the drawer irrespective of any equities existing between the original parties.<sup>6</sup>

Where a check is transferred after it is dishonored, the drawer is still liable to the holder, the only effect of such a transfer being that the transferee takes it with all the defences which the drawer may have against the person from

<sup>1</sup> Goodman vs. Harvey, *supra*.

<sup>2</sup> Lancaster Bank vs. Woodward,

*supra*.

<sup>3</sup> *Id*.

<sup>4</sup> Boehm vs. Sterling, 7 T. R. 424.

<sup>5</sup> *Id*.

<sup>6</sup> Jacks vs. Darrin, 3 E. D. Smith,

557.

whom he received the check, and there is no presumption that overdue or dishonored paper is invalid.<sup>1</sup>

*Certified Checks.*

The practice of certifying checks, although of very recent origin, cannot be definitely traced to any fixed time, but it evidently came into use since Kyd and Byles wrote their treatises on bills, and certified checks are not even alluded to by so recent a writer as Story.<sup>2</sup> The practice may have grown out of the custom of banks to issue certificates of deposit, to which the certification of a bank bears a strong analogy.<sup>3</sup>

But certified checks bear a greater similarity to what have long been known in England as "marked checks." It has long been a practice among English bankers, when a check is presented after banking hours, and too late for payment, to mark the check without writing their name or any word or words upon it, by which act they represented that the check was good, and would be paid upon presentation the following morning.<sup>4</sup> And the practice of certifying checks in this country, at least in the city of Boston, seems to have been limited to this purpose in its inception.<sup>5</sup>

In the case of *Massey vs. Eagle Bank*,<sup>6</sup> which was an action against the defendant bank to recover on a check drawn against the bank, and certified by its teller as "good," the question arose as to the authority of the teller to certify the check. It was contended, on the part of the plaintiff, that the evidence showed that it was the practice among the banks

<sup>1</sup> *Cowing vs. Altman*, 79 N. Y. 167.

<sup>\*</sup> *Robson vs. Bennett*, 2 Taunt.

<sup>2</sup> *Daniel on Negotiable Instruments*, 557.

388.  
<sup>5</sup> *Massey vs. Eagle Bank*, 50 Mass.

<sup>3</sup> *Barnes vs. Ontario Bank*, 19 N. Y. 159; *Thomson vs. Bank of British North America*, 82 id. 1.

306.  
<sup>6</sup> *Supra*.

of Boston for one of its officers, generally the teller, to certify checks as "good." In considering this part of the case, the court say: "In examining the evidence which was offered to the jury, and which is reported at some length, we are well satisfied that no such general usage has been proved; but that, in some of the banks, a practice has existed for one of the officers of the bank, generally the teller, to certify that the check of a depositor is good, when it was necessary for him to use his check at another bank, after bank hours, to prevent the protest of a note; in which case his check would, of course, be presented for payment the next morning by the bank receiving the same; or, occasionally, when a remittance was to be made to a correspondent at a distance; and sometimes, for the convenience of the officers, where the money was needed to be paid at another bank, and the amount of the check was large, to save the labor of counting the bills. The cases vary from the one at bar. They were evidently those of special convenience for a particular occasion, and which, from the uprightness of the officers, and the solvency of parties, worked no mischief. But even these cases were neither proved to be general, nor applicable to all the banks, so as to establish a usage. The case at bar, on the other hand, was the giving of large credits to the persons drawing the checks, to enable them to borrow money on the strength of the certificates. In some banks, checks were occasionally certified for customers, to be used by them at their convenience, where the funds were in the bank to meet them; but the practice, as proved, was of such limited extent as not to bear on the question of usage." The trial of this case took place in 1841, and we have the finding of the court that no general usage of certifying checks prevailed at that time in Boston.

In another case, the court said: "The practice of certifying checks has grown out of the business needs of the country.

They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other ; and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money.<sup>1</sup>

The effect of a certification of a check is very similar to that of the acceptance of a bill of exchange, as was decided in the last-mentioned case. By the law-merchant, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good ; and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions until in the course of business it goes back to the bank for redemption and is extinguished by payment.

“In well-regulated banks, the practice is,” says the court in the last-mentioned case, “at once to charge the check to the account of the drawer, to credit it in ‘a certified check account,’ and, when the check is paid, to debit that account with the amount. Nothing can be simpler and safer than this process.” But the effect of the certification by the drawee of the check that the check is good goes even beyond that of the acceptance of a bill of exchange ; for in the case of the certification

<sup>1</sup> Merchants' Bank vs. State Bank, 10 Wall. 604.

of the check the bank or drawee becomes the sole debtor, and the drawer is absolutely discharged.<sup>1</sup>

The reason of this distinction is that the check is due when certified, whereas in the case of a bill of exchange the acceptance is before maturity.

"The bank virtually says that the check is good; we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it. The holder says No, I will not take the money; you may certify the check and retain the money for me until this check is presented."<sup>2</sup>

This is equivalent to payment as between the holder of the check and the drawer. Such, at least, is the law in the State of New York as laid down by the Court of Appeals. But it seems that the law has been declared to be otherwise in some States.<sup>3</sup> But the certification would not discharge the drawer of a check who himself procured it to be certified, and then put it into circulation.<sup>4</sup>

There can be no doubt that the certification by the drawee changes the relation between the drawee and the payee or holder of the check. Until acceptance or certification the

<sup>1</sup> First Nat. Bank of Jersey City vs. Leach, 52 N. Y. 350; Thomson vs. Bank of British North America, 82 id. 1.

<sup>2</sup> Id.

<sup>3</sup> In the Supreme Court of Illinois, it is held that although certified checks pass from hand to hand as cash, still they are not cash or currency in the legal sense of these terms, and they do not lose, on that account, any of the characteristics of bills of exchange; and therefore, when dishonored, the holder has a right to look to the drawer for payment. And it can make no difference whether the drawer is actually charged on the books of the drawee or not with the amount of the check when it is endorsed "good" (Bick-

ford vs. First Nat. Bank, 42 Ill. 238; see also Brown vs. Leckie, 43 id. 497). But in the case of First Nat. Bank vs. Whitman, 94 U. S. 343, the court cite the case of Bank vs. Leach, 52 N. Y. 350, as holding that certifying a check as "good" discharges the drawer, and as to him amounts to payment. Yet in New Hampshire it has been held that the presentment and acceptance of a check at a bank do not amount to a payment of a pre-existing debt without an agreement to receive it as such (Barnet vs. Smith, 30 N. H. 256).

<sup>4</sup> First Nat. Bank vs. Leach, 52 N. Y. 350; Thomson vs. Bank of British North America, 82 id. 1.



holder of the check has no claim whatever against the bank or drawee. There is no privity of contract between them.<sup>1</sup> But when the drawee certifies the check as "good," he enters into an obligation to pay the check whenever presented. The payee thus obtains the promise and credit of a new party to the check.<sup>2</sup>

If the holder of a certified check should lose it, he would still have his remedy upon it against the bank, but could not have recourse against the drawer whose funds had been thus locked up or transferred to the credit of another party.<sup>3</sup>

Even the subsequent payment by the bank of a certified check upon a forged endorsement would not relieve it of its liability upon the contract it had made with the true owner, nor restore to the drawer the right to draw upon the bank for the funds which had been appropriated to the payment of the check.<sup>4</sup>

There may also be a formal acceptance written upon the check, in which case the bank stands to the holder in the position of a drawer and acceptor of a bill of exchange.<sup>5</sup> Whether the certification be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance.<sup>6</sup> The drawee then becomes the principal debtor.<sup>7</sup> The certification also changes the relation of the drawee and the drawer of the check. The amount of the check is supposed to be charged

<sup>1</sup> *Planters' Bank vs. Merritt*, 7 Heisk. 177; *Bank of the Republic vs. Millard*, 10 Wall. 152; *First Nat. Bank vs. Whitman*, 94 U. S. 343.

<sup>2</sup> *First Nat. Bank vs. Whitman*, supra; *Cook vs. State Nat. Bank*, 52 N. Y. 96; *Willeys vs. Phenix Bank*, 2 Duer, 131.

<sup>3</sup> *Thomson vs. Bank of British North America*, 82 N. Y. 1.

<sup>4</sup> *Id.*

<sup>5</sup> *First Nat. Bank vs. Whitman*, supra; *Merchants' Bank vs. State Bank*, 10 Wall. 604; *Espy vs. Bank of Cincinnati*, 18 id. 604.

<sup>6</sup> *First Nat. Bank vs. Whitman*, supra.

<sup>7</sup> *First Nat. Bank vs. Whitman*, supra; *Meads vs. The Merchants' Bank*, 25 N. Y. 143.

up at once against the drawer, so that he can no longer control that part of the fund represented by the check.<sup>1</sup> Such acceptance discharges the drawee as debtor to the drawer, and makes him a debtor to the holder of the check.<sup>2</sup>

Where a check is transferred by delivery without endorsement, and it is certified by a bank before endorsement, the certification has the same legal effect as if the check had been properly endorsed. And the fact that the check was drawn and delivered to the payee for his accommodation, and was transferred without endorsement to the person presenting the same for certification, in payment of a precedent debt, does not affect the liability of the bank certifying the check.<sup>3</sup>

A cashier of a bank has authority, by virtue of his office, to certify checks if the drawer has funds;<sup>4</sup> and, if the drawer has no funds, the bank is nevertheless liable to a *bona fide* holder.<sup>5</sup> So tellers and other subordinate officers of a bank, who act under the direction of the cashier, are but the arms by which designated portions of his various functions are discharged, and have a like power in this respect.<sup>6</sup>

No particular form is requisite in the certification of a check. The ordinary form is for the officer making the certification to write the word "good" on the face of the check, together with his initials. Sometimes he writes his own name or initials, and nothing more. And, again, only the word "good," omitting his name or initials. The certification is never written out in full, and therefore it seems that any mark indicating that the check has been presented and accepted is sufficient. In fact, in England, until a recent stat-

<sup>1</sup> Bickford vs. First Nat. Bank, 42 Ill. 238. 10 Wall. 604; Cooke vs. State Nat. Bank, 52 N. Y. 96.

<sup>2</sup> Bullard vs. Randall, 69 Mass. 605.

<sup>5</sup> Id.

<sup>3</sup> Freund vs. Importers and Traders' Nat. Bank, 76 N. Y. 352.

<sup>6</sup> Merchants' Bank vs. State Bank, 10 Wall. 604.

<sup>4</sup> Merchants' Bank vs. State Bank,

ute required a distinct promise to be in writing and signed, a simple mark, not being a word at all, was often placed upon checks to indicate their acceptance. These were called "marked checks."<sup>1</sup>

"Any language, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good and will be paid, stops the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same."<sup>2</sup>

The oral acceptance of a check, or the oral promise to pay a check, is valid, and can be maintained.<sup>3</sup> But in the State of New York a mere verbal acceptance of a check is invalid by statute.<sup>4</sup>

At common-law an acceptance of a check or bill of exchange may be by parol.<sup>5</sup> On the presentment of a check to the cashier of a bank, his statement that it is "good" is competent evidence of acceptance, if not, indeed, an acceptance itself.<sup>6</sup>

In a recent case in the Supreme Court of the United States,<sup>7</sup> the court say that the highest courts in this country and England have regretted the decisions which gave original sanction to the rule that a verbal acceptance or promise to accept drafts or bills of exchange is equivalent to a written acceptance. And the court show an evident desire to limit

<sup>1</sup> Morse on Banking, 315; Robson vs. Bennett, 2 Taunt. 387.

<sup>2</sup> Pope vs. Bank of Albion, 59 Barb. 226.

<sup>3</sup> National Bank vs. National Bank, 7 W. Va. 544. And § 5208 of the U. S. Rev. Stat., making it unlawful for National Banks to certify checks where the drawer has not sufficient funds on deposit to pay the same, does not invalidate an oral accept-

ance of a check where there are sufficient funds of the drawer on hand at the time to meet it (id.).

<sup>4</sup> 1 N. Y. Rev. Stat. 768, § 6; Duncan vs. Berlin, 60 N. Y. 151; Risley vs. Phenix Bank, 83 id. 318.

<sup>5</sup> Barnet vs. Smith, 30 N. H. 256, and cases cited.

<sup>6</sup> Barnet vs. Smith, *supra*.

<sup>7</sup> Espy vs. Bank of Cincinnati, 18 Wall. 604.

the validity and scope of a verbal acceptance of a check. In that case, the payees of a raised check, receiving it from a stranger, sent it to the bank upon which it was drawn to ascertain whether it was good. The information was asked only for their own protection, and not for the purpose of giving currency to the check. The court say that they would not undertake to say what would have been the legal effect in such a case if the bank officer had endorsed the check as "good" in the ordinary way; but they do say that the verbal statement of the cashier, under the circumstances of this case, that it was "good," or that it was "all right," did not bind the bank as to the genuineness of the body of the check, so that the loss occasioned by the check being raised would fall on the bank.

In a case in the United States Circuit Court for the First Circuit, a check was presented for payment, and the cashier replied that if the check were presented through the Clearing-house it would be paid; but when presented the next morning through the Clearing-house, it was dishonored. At the time the cashier made this promise the drawer had not funds in the bank, although the payee did not know this fact. The court held that as there were no funds in the bank belonging to the drawer at the time it was presented to the bank for payment, and the bank being, therefore, under no obligation to pay the check, it was a mere verbal promise to pay the debt of another, and void under the Statute of Frauds, since it was not in writing. But the court intimated that the verbal promise would have been good if the drawer had funds in the bank when the promise was made, for then the engagement would have been to pay to the payee the drawee's own debt to the drawer.

In the case of *Marine National Bank vs. National City Bank*,<sup>1</sup>

<sup>1</sup> 59 N. Y. 67.

where the question was as to the liability of a bank upon a certification of a raised check, the court said: "The case at bar is distinguished from the reported case by the fact that in one the certification was verbal and in the other it is in writing—a circumstance which cannot, as we think, distinguish them in principle. The representation and assurance that the check is 'good' or 'all right' is the same in legal effect as well as in its effect in influencing the actions of others, whether made orally or written upon the face of the paper. It is the assertion of the fact, and not the mode of its communication, that gives it effect and imposes a legal obligation."

Where a bank admits a forged certification to be genuine, its legal effect is just the same as though it were in fact the certification of the bank. A case of this nature has been recently decided by the New York Court of Appeals. In that case the facts show that one R. bought from C. & Co., through his Brokers, a certain quantity of gold deliverable the next day. On that day R. presented himself at the office of C. & Co., never having been seen or known by any of the firm before, asked for the gold, and gave in payment his check drawn on the Continental National Bank and purporting to be certified by that bank. R., when he took the gold, stated that he intended to make delivery of the gold to one S. C. & Co. handed the check to their clerk, and told him to go to the bank and see whether the check was all right, and, if not right, to go to S. and stop the gold. The clerk went as directed, presented the certified check to the teller, and was told by him that it was all right. The messenger immediately returned and reported to C. & Co. this information. The messenger was absent not more than two minutes, but before his return the gold was delivered to R., and he had departed. When R. presented the gold checks to the bank upon which they were

drawn, he was required to be identified, and in doing this some ten or fifteen minutes elapsed before he was able to get the gold. C. & Co. deposited the check given by R. in their bank the same afternoon, and the next day it was charged to the Continental National Bank through the Clearing-house. On that day the forgery was discovered, and notice was given to the defendant bank. The Continental National Bank then sued the National Bank of the Commonwealth, to which it had paid the check, to recover back the money. The jury found for the defendant. The Court of Appeals said: "That the plaintiff would be bound by the act of its teller, had he in fact certified the check, is settled.<sup>1</sup> Nor do we doubt that an admission by him that it was genuine, made on the presentation to him of the counterfeited certification and inquiry put, also binds the plaintiff. We can see no difference in result and effect upon others dealing with the check on the strength of that admission—between writing 'Timpson, teller,' signifying good, upon a worthless check, and declaring that the words 'Timpson, teller,' already there, were written there by him. In the one case they are his own, and signify good. In the other, he adopts them as his own, and they signify good. This was the effect of his admission." In reply to the objection raised by the plaintiff's bank, that C. & Co. were not misled by the action of the bank in admitting the forged certification to be genuine, inasmuch as the gold checks were delivered to R. before the messenger returned with the certification of the bank, the court held that it made no difference whether the injury occurred through an affirmative act, induced by the mistake of the bank, or by an act of omission; and that C. & Co. were just as much injured by refraining to stop the payment of the gold, which the jury were warranted

<sup>1</sup> Farmers and Merchants' Bank vs. Butchers and Drovers' Bank, 16 N. Y. 125; s. c. 14 id. 623.

in finding that they could, in all probability, have done, had they been informed of the forgery, as they would have been by delivering the gold checks after receiving the report from the bank.<sup>1</sup>

But a verbal certification must not be confounded with a parol acceptance. The former operates by way of estoppel, while the latter is a promise to pay. In the State of New York, a parol acceptance of a check is invalid by statute.<sup>2</sup>

*The mere retention of a check by a bank does not amount to an acceptance* unless under special circumstances that give it that effect. When a check, instead of being presented at the counter of a bank by the holder or agent, is forwarded to the bank by mail, in the absence of any established course of dealing between itself and such holder, the bank would be under no obligation to return the check, but may safely wait in silence the further action of the holder.<sup>3</sup> And if the time within which dishonored checks can be retained is governed by the rules or usage of the Clearing-house, the same rule as to time cannot apply to checks drawn on out-of-town banks.<sup>4</sup>

The rule that the retention of a check does not constitute an acceptance applies also to bills of exchange.<sup>5</sup> Where the bank pays a check on a forged endorsement, that does not amount to an acceptance of the check so as to give to the true owner a right of action against the bank.<sup>6</sup>

*The acceptance of a check may be conditional;* and when the condition is performed, the accepting bank or drawee is

<sup>1</sup> Continental Nat. Bank vs. The Nat. Bank of the Commonwealth, 50 N. Y. 575.

<sup>2</sup> 1 Rev. Stat. 768; Duncan vs. Berlin, 60 N. Y. 151.

<sup>3</sup> Overman vs. Hoboken City Bank, 31 N. J. L. R. 563.

<sup>4</sup> Id.

<sup>5</sup> Jenne vs. Ward, 2 Stark. 326.

<sup>6</sup> First Nat. Bank vs. Whitman, 94 U. S. 343.

liable. So in a case where a check was presented to a bank for acceptance, and the bank promised to pay the same as soon as it received information that a certain draft, placed in its hands for collection by the drawer of the check, had been paid, and the bank not only received information that the draft was paid, but it had been in fact paid, it was held that the bank was liable on its conditional acceptance.<sup>1</sup>

And in the same case it was held that the act of Congress of March 3, 1869, which makes it unlawful for any officer of a national bank to certify a check unless the drawer has funds on deposit at the time equal to the amount specified in such check, does not prohibit the bank from promising to pay the check when the drawer shall have funds for the purpose in the possession of the bank. This section of the act does not make the check invalid as against the bank, but only subjects it to be proceeded against by the Comptroller for a violation of the act, etc.

But the acceptance, though conditional, should be unequivocal. A firm in Calcutta instructed their bankers in London to hold a certain sum, about to be realized out of remittances and consignments, at the disposal of M. & Co., of Liverpool, to whom the firm in Calcutta was indebted. The London bankers informed the Liverpool firm that the remittances and consignments would probably fall short of their cash advances to the Calcutta firm, but promised that, if they should receive further remittances and consignments sufficient to enable them to meet the wishes of their Calcutta correspondents, they would advise M. & Co., of Liverpool. Subsequently the Calcutta firm revoked the order for the appropriation of the money to the account of the Liverpool firm. Held, that this did not amount to an absolute agreement by the

<sup>1</sup> National Bank vs. National Bank, 7 W. Va. 544.



London firm to pay the money out of the remittances and consignments.<sup>1</sup>

We have already seen the nature of the contract entered into by the drawee of a check when he certifies the same; and the question as to the limitations of the contract, and the extent of the representations entered into when a check is certified by a bank or other drawee, will now receive some consideration. And this involves the subject of the alteration of checks and the forgery of the signature. When a bank or other drawee certifies a check in the usual form, it simply certifies to the genuineness of the signature of the drawer, and that the drawer has funds sufficient to meet it, and engages that those funds, sufficient to pay the check, shall not be withdrawn from the bank by him. It does not, by such certification, warrant the genuineness of the check in all its parts, including the specification of the amount to be paid and the names and identity of the payees.<sup>2</sup> To this extent the knowledge of the bank will enable it to go in safety, in the way of representation of facts; and its own power over its own funds will suffice to protect it as to its obligation.<sup>3</sup> But if the certification went to the genuineness of the whole check, it would effectually put an end to the use of certified checks, at least in their present form.<sup>4</sup>

Whether the check has been altered in the amount specified in the body of the check, or whether the date or the names of the payees have been changed, are facts more peculiarly within the knowledge of the drawer of the check; and it will not be presumed, in the absence of evidence to the contrary, that the drawee undertook anything more in the way of statement than that the signature is genuine, and

<sup>1</sup> *Malcolm vs. Scott*, 5 Ex. 601.

<sup>3</sup> *Id.*

<sup>2</sup> *Marine Nat. Bank vs. Nat. City Bank*, 59 N. Y. 67.

<sup>4</sup> *Id.*

that the drawer has sufficient funds on deposit to meet the check.<sup>1</sup>

In the case of the Security Bank of New York vs. The National Bank of the Republic,<sup>2</sup> the New York Court of Appeals went still further in limiting the effect of certification than in the case of the Marine National Bank vs. The National City Bank,<sup>3</sup> and held that although the teller of the plaintiff bank, at the time of certifying the check, assured the person presenting it for certification that it was correct in every particular, the certification went no further than simply to affirm the genuineness of the signature of the drawer, and that he had sufficient funds to meet it, and that the bank engaged that such funds should not be withdrawn to the prejudice of the holder. In this case the check had been altered before certification, by raising the amount of the check and changing the date and the name of the payee. The person presenting the check told the teller that the check had been brought to his firm by a total stranger, and that he did not like his looks, and that "he wanted the teller to be very particular before certifying the check; that he had a doubt in his mind about it, and he wanted to be assured that the check was genuine in every particular." The teller examined it, certified it, and handed it back, saying, "You need not have the slightest doubt about that check; it is correct in every particular; the drawer is a director in this bank." The court said that if the reply made to the question put to the teller was intended as an affirmation of the genuineness of the body of the check, it was simply an expression of his opinion, and must have been so understood by the person who made the inquiry. The court further held that evidence to show, by bankers and merchants, the meaning of the word "certified," and that when

<sup>1</sup> Marine Nat. Bank vs. Nat. City Bank, 59 N. Y. 67; Espy vs. Bank of Cincinnati, 18 Wall. 604.

<sup>2</sup> 67 N. Y. 458.

<sup>3</sup> 59 N. Y. 67.

used in transactions similar to that in the case before the court it was understood to import an absolute obligation by the certifying bank to pay the check, although the amount had been fraudulently raised, was properly rejected on the trial. The court on this point says: "The nature and meaning of the contract, evidenced by the certification of the check, was clearly defined by law, when the plaintiff certified the check in question. By the law as thus declared, the plaintiff, upon the certification of the check, became liable for its payment with the obligation of an acceptor of a bill; and this was the extent of the obligation into which he entered, according to the legal effect and interpretation of the contract. The offer to prove that the contract of certification by the understanding of the bankers and merchants had a larger scope and meaning than it had by settled legal construction was inadmissible."<sup>1</sup>

The extent of the liability of a bank or other drawee, upon its certification of a raised check, or a check altered as to its date, or the name of the payee, where the certification was made in the ordinary way, in writing on the check itself, seems never to have been passed upon by the Supreme Court of the United States. In the case of *Espy vs. Bank of Cincinnati*,<sup>2</sup> however, they had before them, and decided, the extent of the liability of a bank upon a *verbal* certification of a check which had been fraudulently altered in respect to the amount, the date, and the names of the payees. The facts of the case show, in substance, that the plaintiffs in error, a firm of Brokers in Cincinnati, received in the course of their business the check of S. M. & Co., payable to their order, in payment of certain bonds and a quantity of gold, which were purchased

<sup>1</sup> *Bargett vs. Orient. Mutual Ins.* 53 id. 19; *Wheeler vs. Newbould*, 16 Co. 3 Bosw. 385; *Higgins vs. Moore*, id. 392.  
34 N. Y. 417; *Lawrence vs. Maxwell*, <sup>2</sup> 18 Wall. 604.

from them by an entire stranger. Before delivering the bonds and gold, the plaintiffs sent the check to the bank to ascertain whether it was good. The teller said that it was "good," or that it was all right, and to "send it through the Clearing-house." The messenger who carried the check to the bank testified that he told the teller that the check was offered by a stranger. The teller denied that he was told this, but asserted, notwithstanding, that he told the messenger that if the check was offered to the plaintiffs by a stranger he would advise them to have nothing to do with him, no matter how well-looking he was.

The jury, when the case was at trial, seem to have found that there was nothing that transpired between the messenger and the teller to direct his attention particularly to the genuineness of the body of the check; for, after being charged by the court that if the defendants in the court below sent the check to the bank for the purpose of testing its genuineness in all respects, and with that knowledge the teller stated that it was "good" or "all right," the bank was estopped from setting up that the check was raised, the jury found for the bank. And the Supreme Court, in laying down the law in the case, take the facts to be that the teller was not asked to certify to the genuineness of the check in all particulars; and that it was the ordinary case of a payee of a check sending it to the bank to ascertain whether it was good, simply for his own protection, and not for the purpose of getting the certification of the check for the purpose of giving it currency. Under this state of facts the court held that the statement of the teller that the check was "good," or that it was "all right," did not amount to a certification by the bank that the check was genuine in all particulars. And the judgment directing the repayment of the money to the bank was affirmed.

At the trial the court charged the jury that "if defendants

sent the check for the purpose of testing the genuineness of the signature of the drawers, the state of their account, and to test its genuineness in all other respects, and the plaintiffs, knowing the full extent of the object for which it was sent, replied, 'It is good,' 'It is all right,' plaintiff is estopped to set up that the check was raised." As to this part of the charge the Supreme Court say: "Unless we are prepared to hold to the fullest extent the principle asserted by the plaintiffs in error, that the general statement that the check was good binds the party making it as to everything connected with its validity, this charge of the court is as favorable to them as it should have been, *and is only doubtful as it militates against the bank.*"

The court further say that they did not propose in that case to decide what would have been the legal effect if the officer had, under precisely the same circumstances of the case—that is, under the circumstances of the check having been presented for certification simply for the information and security of the holder of the check, and in the absence of facts casting suspicion upon the check—been requested to endorse the check as good, and had done so, affixing his name or his initials in the ordinary way. But, they continued, "where the object is to use the endorsement to put the check in circulation, or raise money on it, or use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of the acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when checks are certified, as we know they often are, without reference to the presence of funds by the drawer, and when the well-known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation."

Where a bank certifies a check which has been obtained from the maker by the party presenting it for certification by fraud, the bank is liable to an innocent holder for value; and the fact that the party so obtaining the check by fraud gives the drawer a fictitious name, which he inserts in the check as payee, makes no difference.<sup>1</sup>

Sometimes the alteration in the body of the check is made after certification, and then the question arises as to how such alteration affects the liability of the bank. If, as we have seen, the certification of the bank is not a representation of the genuineness of the body of the check, when the check it is called upon to certify is a check which has been raised, or altered otherwise than by the signature, before the time of its presentation for certification, it would seem to be still more certain that the certification does not cover an alteration made after the check has been certified. But where a bank has certified a check which has been subsequently raised, and the bank has paid the check as so altered, it has been sought to make such certification operate as an estoppel, so as to prevent the bank from recovering back from the payee the amount over and above the original amount of the check which it has paid out upon the same after such certification and the subsequent alteration. Such was the case of *The National Bank of Commerce vs. The National Mechanics' Banking Association*, decided in the New York Court of Appeals.<sup>2</sup> On the 15th of February, 1870, one G. obtained from V. & Co. their check, dated that day, on plaintiff's bank for \$56.75, payable to his order; on the same day it was certified in the usual manner by the plaintiff. After being thus certified, it was fraudulently altered by changing the date to the 10th of February, and raising the amount to \$15,006, and was depos-

<sup>1</sup> *The Merchants' etc. Trust Co. vs. The Bank of Metropolis*, 7 Daly, 137.      <sup>2</sup> 55 N. Y. 211.

ited by G. with defendant. G. was a customer of defendants, and made other deposits on that day amounting, with said check, to about \$20,000. He, on the same day, drew out all of his deposits, save a balance of \$2626.24. The check was paid on the 17th at the Clearing-house, and was sent with other vouchers to plaintiff, who charged it to V. & Co.'s account. The account was written up on the 24th of February. On the 1st of March V. & Co. discovered the alteration and notified the plaintiff, whose officers immediately notified the defendant, and demanded repayment of the money so paid, which was refused. It was contended, on the part of the defendant, that, when the check for fifty-six dollars was certified by the Bank of Commerce, such certification made it an obligation of that bank; that, when subsequently presented to the bank in its altered condition as a check for \$15,006, the bank was bound to know its non-obligation, and to detect the forgery; and that the bank, by recognizing it as genuine, and acquiescing in the payment through the Clearing-house, precluded itself from afterwards setting up its own mistake.

The court say: "On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the party receiving the payment the right to retain what was not his due, unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not, in justice, be permitted to avail himself of the mistake of the other party to shift the loss upon the latter. To render it compulsory upon the courts to refuse a correction of the mistake, the facts of the case must bring it within the excepted one before referred to. This the facts of the present case fail to do. The essential element is wanting, that the body of the instrument, as well as the certi-

fication, was the work of the bank; and that therefore it was conclusively presumed to know, by a mere inspection of the instrument, whether or not it had been altered. The bank was not bound to know the handwriting or genuineness of the filling-up of the check. It was legally concluded only as to the signature of the drawer and its own certification. . . . If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff—as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor—then clearly, to the extent of the loss thus sustained, the plaintiff should be responsible.” But as the Mechanics’ Banking Association paid out to G., its depositor, the money on the credit of the altered check, before the Bank of Commerce paid the same, it could not have been misled or prejudiced by the mistake or negligence of the latter bank. And the president of a bank has no power to certify, on the part of the bank, checks drawn by himself on the bank; and as such want of authority appears on the face of the check, there can be no *bona fide* holder of it.<sup>1</sup>

### *Forged Checks.*

The subject of forged checks is important as involving the question upon whom the loss shall fall where they are paid upon a forged signature either of the drawer or of an endorser.

The general rule of law, that he who is guilty of a mistake or of negligence must suffer by his own act, is the principle which controls in all such cases; and the liability of a person paying out money under a mistake seems to be absolute, except so far as his conduct may have been caused by the action or inaction of the injured party. A bank is bound to

<sup>1</sup> *Claffin vs. Farmers & Citizens’ Bank*, 24 How. Pr. (N. Y.) App. 1.



know the signatures of its depositors; and if it pays a check to which the name of a depositor is forged, the loss must fall upon the bank.<sup>2</sup> But the depositor may, if he choose, affirm the payment by the bank, and recover the money from the party to whom it was paid.<sup>3</sup> Or the real payee may sue the illegal holder of the check in trover.<sup>4</sup>

Whether the forger has used the same paper on which the original instrument had been written and signed, and manipulated it to suit his purposes, or made and forged a check on another and different piece of paper, is not material, so long as the signature of the drawer was counterfeit.<sup>5</sup>

Where a party intervenes and pays a draft which has been dishonored, for the credit of the drawer, he also is concluded by such payment as to the genuineness of the drawer's signature.<sup>6</sup> But if he paid the draft without having an opportunity of examining it, he would not be so concluded.<sup>7</sup>

A bank accepting or certifying a check is also concluded as to the genuineness of the signature of the drawer.<sup>8</sup> So where one pays a draft purporting to be drawn by him, he cannot afterwards set up that the acceptance was a forgery as against a *bona fide* holder to whom payment has been made.<sup>9</sup> But where a banker discounts a bill purporting to be drawn by a customer, and made payable at his bank, he is not concluded by such payment as to the genuineness of the signature, and

<sup>1</sup> Price vs. Neal, 3 Burr. 1355; Smith vs. Chester, 1 T. R. 655; Bass Canal Bank vs. Bank of Albany, 1 vs. Clive, 4 M. & S. 15; Levy vs. Hill, 287; Levy vs. Bank of U. S. 1 U. S. Bank, 1 Binn. 27; Goddard vs. Merchants' Bank, 4 N. Y. 147; Park Bank vs. Ninth Nat. Bank, 46 id. 77.

<sup>2</sup> Weissner vs. Denison, 10 N. Y. 68.

<sup>3</sup> Bobbett vs. Pinkett, 1 L. R. Ex. Div. 368.

<sup>4</sup> Id. Park Bank vs. Ninth Nat. Bank, 46 N. Y. 77.

<sup>5</sup> Goddard vs. The Merchants' Bank, 4 N. Y. 147.

<sup>6</sup> Jenys vs. Fowler, 2 Stra. 946; 273.

<sup>7</sup> Id. Bank of Commerce vs. Union Bank, 3 N. Y. 230; Burrill vs. Watertown Bank, 51 Barb. 105; Bank of Commerce vs. Nat. Mechanics' Banking Assoc. 55 N. Y. 211.

<sup>8</sup> Bank of Commerce vs. Nat. Mechanics' Banking Association, supra; Mather vs. Lord Maidstone, 18 C. B.

may recover back the money.<sup>1</sup> And if a bank pay a check on a forged endorsement, the bank, and not the drawer, must bear the loss.<sup>2</sup> The bank is liable to the true owner of the check.<sup>3</sup> But where a drawee of a check pays it to an innocent holder on the faith of a forged endorsement, he can recover back the money;<sup>4</sup> and if there is no unreasonable delay after the discovery of the forgery, the money may be recovered at any time after payment, no matter how long.<sup>5</sup>

It would be no defence that the innocent endorser could not be restored to his original position upon paying back the money.<sup>6</sup> The principle is the same where a bank pays a check on the spurious endorsement of one who bears the same name as the real payee, and it is still liable to the true owner.<sup>7</sup> And where the bank has paid a check upon a forged endorsement to one to whom it has been endorsed for collection, the bank may recover against the latter as though he were the principal.<sup>8</sup> So where a banker has discounted a check for a Broker, who has paid over the money to his principal, the Broker must refund the money.<sup>9</sup>

In an action to recover back money paid under a mistake of fact, it is no defence that the plaintiff had within his reach

<sup>1</sup> Fuller vs. Smith, 1 C. & P. 197.

<sup>2</sup> Morgan vs. Bank of the State, 11 N. Y. 404; Welsh vs. German-American Bank, 73 id. 424; Thomson vs. Bank of British North America, 82 id. 1; First Nat. Bank vs. Whitman, 94 U. S. 343.

<sup>3</sup> Thomson vs. Bank of British North America; First Nat. Bank vs. Whitman, *supra*.

<sup>4</sup> Canal Bank vs. Bank of Albany, 1 Hill, 287; Holt vs. Ross, 59 Barb. 554; 54 N. Y. 473; Bank of Commerce vs. Nat. Mechanics' Banking Assoc. 55 id. 211.

<sup>5</sup> Canal Bank vs. Bank of Albany, 1 Hill, 287; Weisser vs. Denison, 10 N. Y. 68; Burrill vs. Watertown

Bank, 51 Barb. 105. In England bankers paying checks drawn upon them, upon a forged endorsement, are protected by statute (16 & 17 Vict. c. 59, § 19). But this act does not apply to others (Ogden vs. Benas, L. R. 9 C. P. 513).

<sup>6</sup> Kingston Bank vs. Eltinge, 40 N. Y. 391.

<sup>7</sup> Graves vs. The American Exch. Bank, 17 N. Y. 205; Mead vs. Young, 4 T. R. 28.

<sup>8</sup> Canal Bank vs. Bank of Albany, 1 Hill, 287; Holt vs. Ross, 59 Barb. 554; 54 N. Y. 473.

<sup>9</sup> Fuller vs. Smith, 1 R. & M. 49; 1 C. & P. 197.

the means of ascertaining the truth. If, in consequence of a mutual mistake, one party has received the property of another, he must refund, and this without reference to vigilance or negligence.<sup>1</sup>

But where a drawee of a bill pays the same upon a forged endorsement which has been affirmed and recognized as genuine by the drawer, the drawee cannot recover back the money paid to the innocent holder, who discounted it for the drawer with the name of the payee forged upon it. The drawee, under such circumstances, could properly charge the amount paid on the bill against the funds of the drawer in his hands, if there be any; and, if there be none, would have his action against the drawer for money paid to his use;<sup>2</sup> and where the drawer forges the name of the payee, and then puts the bill into circulation, in an action against him he cannot dispute the genuineness of the endorsement.<sup>3</sup> Or where the name of a fictitious payee is endorsed by the drawer.<sup>4</sup>

And it may be stated, as a general rule, that a party is liable on an instrument to which his signature has been forged, if he affirms it.<sup>5</sup> But, ordinarily, a party taking title through a forged endorsement cannot recover from the drawer.<sup>6</sup> And the general rule is that no one can take a good title to a bill through a forged endorsement.<sup>7</sup>

The entry by a bank of a check as cash in the private bank-book of a depositor, the check being drawn upon the bank making the entry, is, however, equivalent to payment; and if

<sup>1</sup> *Kingston Bank vs. Eltinge*, 40 N. Y. 391; *Union Nat. Bank vs. Bobbett vs. Pinkett*, L. R. 1 Ex. Div. Sixth Nat. Bank, 1 Lans. 13; *Bank of Commerce vs. Nat. Mechanics' Banking Assoc.* 55 N. Y. 211.

<sup>2</sup> *Coggill vs. The American Exch. Bank*, 1 N. Y. 113.

<sup>3</sup> *Meacher vs. Fort*, 3 Hill (S. C.), 227.

<sup>4</sup> *Cooper vs. Meyer*, 10 B. & C. 468; 368; *Hardy vs. Chesapeake Bank*, 1 Md. 562.

<sup>5</sup> *Lindsley vs. The European Petroleum Co.* 3 Lans. 176.

<sup>6</sup> *Palm vs. Watt*, 7 Hun, 317.

<sup>7</sup> *Hortsman vs. Henshaw*, 11 How. 177.

the check is a forgery the bank, and not the innocent holder, must support the loss.<sup>1</sup>

The erasure of the words "payment stopped," written upon a check, is not forgery so as to defeat the title of a *bona fide* holder for value who took it after such erasure.<sup>2</sup>

Where, however, the drawee of a check pays the same upon a forged signature of the drawer, he cannot recover back the money from an innocent holder for value to whom it has been paid.<sup>3</sup>

A party paying his own debt by a check to the order of his creditor, or of a party nominated by him, can be called upon to pay it again in case the creditor loses, or is defrauded of, the check, and it is paid to the finder or fraudulent holder on a forged endorsement.<sup>4</sup> But if the check were taken in absolute payment and extinguishment of the debt, the drawee would not be liable.<sup>5</sup>

A payment received in forged paper is not good; and if there be no negligence in the party receiving it, he may recover back the consideration paid for it, or sue upon his original demand.<sup>6</sup> And where the innocent holder of a forged check passes it in good faith to another for value, without endorsement, although he is not liable on the check, he would be obliged to refund the money paid.<sup>7</sup> Payment in a forged check or order is not payment at all as between the party paying and the party whose name is forged.<sup>8</sup>

<sup>1</sup> Levy vs. Bank of U. S. 1 Biun. 27.

<sup>2</sup> Nassau Bank vs. Broadway Bank, 54 Barb. 236.

<sup>3</sup> Price vs. Neal, 3 Burr. 1355; U. S. Bank vs. Bank of Georgia, 10 Wheat. 333-353; Goddard vs. The Merchants' Bank, 4 N. Y. 147; Nat. Park Bank vs. Ninth Nat. Bank, 46 id. 77; Bank of Commerce vs. Union Bank, 3 id. 230; Weissor vs. Denison, 10 id. 68; Nat. Bank of Commerce vs. Nat. Mechanics' Banking Assoc. 55 id. 211.

<sup>4</sup> Thomson vs. Bank of British North America, 82 N. Y. 1.

<sup>5</sup> Id.

<sup>6</sup> U. S. Bank vs. Bank of Georgia, 10 Wheat. 333; Markle vs. Hatfield, 2 Johns. 455.

<sup>7</sup> Jones vs. Ryde, 5 Taunt. 488; Wilkinson vs. Johnson, 3 Ry. & C. 425; 5 D. & R. 403; Fuller vs. Smith, 1 R. & M. 49; 1 C. & P. 197.

<sup>8</sup> Orr vs. Union Bank, 1 Macq. H. L. Cas. 513.

A depositor owes no duty to a bank which requires him to examine his pass-book or vouchers with a view of detecting forgeries of his name,<sup>1</sup> or for the purpose of discovering the forgery of the name of a payee or endorser. He has a right to assume that the bank, before paying checks, will ascertain the genuineness of the signature of the drawer, or that of the endorsers. And a depositor is not precluded from disputing the right of the bank to charge the forged checks against his account for the reason that he has been debited in his pass-book with the checks, and that the checks were returned to him by the bank upon the monthly writing-up of his account, and were retained by him without objection.<sup>2</sup> Such a retention of the pass-book and vouchers might constitute an account stated between the bank and the depositor, but the account could be opened for fraud and the forgeries disclosed.

Where the bank-book and the vouchers are returned, after the account is written up, into the hands of a clerk or agent of the depositor, and he himself does not examine them, he certainly is not concluded by the account. And even where the bank-book and the forged checks come back into his own personal possession, he would still not be bound by the account—unless, indeed, his failure to detect the forgery, or notify the bank of the same, could be charged to his neglect, and the bank was thereby injured.<sup>3</sup>

And this doctrine has been again reaffirmed by the New York Court of Appeals in the recent case of *Frank vs. The Chemical National Bank*,<sup>4</sup> where checks were forged by plaintiffs' confidential clerk, who filled out the checks and had charge of their bank-book. These forged checks were paid

<sup>1</sup> *Weisser vs. Denison*, 10 N. Y. 68; *Bank*, 73 N. Y. 424; *Weisser vs. Denison*, 10 id. 68; *Frank vs. Chemical Nat. Bank*, 84 id. 209.

<sup>2</sup> *Welsh vs. German - American*

<sup>3</sup> *Id.*

<sup>4</sup> 84 N. Y. 209.

and charged to plaintiffs in their pass-book, the book balanced, and the checks, including those forged, returned to their clerk, who aided plaintiffs in examining the account, and who, by abstracting the forged vouchers and other means, prevented the discovery of the forgeries. The court sustained the recovery of the plaintiffs below, and decided that they were not estopped by the facts disclosed, which showed that the plaintiffs had used ordinary care in examining the accounts with the bank, and that depositors are under no duty so to conduct the examination that it will necessarily lead to the detection of the fraud.

Even the admission of the genuineness of the signature to a forged check will not conclude a party where such admission is made in good faith, unless third persons have been induced to give credit to the check and part with value upon the faith of such admission.<sup>1</sup>

And although a depositor in a bank is induced, by the fraudulent representations of his clerk, to draw a check and intrust it to him, and the clerk forge the name of the payee and draws the money, that fact will not absolve the bank from liability.<sup>2</sup>

The rule that the drawee is concluded as to the genuineness of the signature of the drawer by his acceptance or payment of a bill does not apply to a case where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill.<sup>3</sup>

A bank is not bound to know the handwriting or genuineness of the filling-up of a check. It is legally concluded only as to the signature of the drawer and its own certification. So that where a bank certifies a check, which is subsequently

<sup>1</sup> Hall vs. Huse, 10 Mass. 40;      <sup>2</sup> Welsh vs. German - American  
Salem Bank vs. Gloucester Bank, 17 Bank, 73 N. Y. 424.  
id. 1; Weisser vs. Denison, 10 N. Y.      <sup>3</sup> Bank of Commerce vs. Union  
68.      Bank, 3 N. Y. 230.

altered by raising the amount, and the bank pays it as so altered, it is not concluded as to the genuineness of the body of the check by the act of payment; and, upon discovery of the forgery, may recover back the money.<sup>1</sup> But if the party to whom the check is paid has suffered loss in consequence of the mistake of the bank in making the payment, the bank paying the money would have to bear the loss to that extent.

In a case where the bank paid a check which it had certified, but had been raised subsequent to such certification, it was contended that the certification made the check the obligation of the bank, of the genuineness of which, as a whole, the bank was bound to have knowledge. But the court made a distinction between those obligations of a bank in which the body of the instrument, as well as the signature, is the work of the bank, as in the case of ordinary bank-bills, and the case of a mere certification of a check, in which the certification alone is made and issued by it. In that case the court say: "The distinguishing feature of all the cases is that the forgery ought to have been detected by a bare inspection of the instrument itself, without the necessity of reference to books or anything outside the document presented, even the memory of the party as to the written obligations which he has issued."

Where, however, a bank receives as genuine its own notes, which have been raised in their amounts, and passes them to the credit of a depositor, who acts in good faith, it is bound by the credit thus given, and the notes must be treated as cash.<sup>2</sup> But it was held in a case in Massachusetts that where a bank paid its notes upon which the name of its president

<sup>1</sup> Nat. Bank of Commerce vs. Nat.      <sup>2</sup> U. S. Bank vs. Bank of Georgia,  
Mechanics' Banking Assoc. 55 N. Y. 10 Wheat. 333.  
211.

had been forged, it might recover back the money paid if demanded without delay.<sup>1</sup>

Where the holder of a check alters the same by substituting a larger sum for that written in the check, the banker who pays the same cannot charge his customer for anything beyond the sum for which the check was originally drawn.<sup>2</sup> So the change of the date of a check is a material alteration, and vitiates the same in the hands of a *bona fide* holder, who takes it without notice, although he takes it by mere delivery, the check being payable to bearer.<sup>3</sup> But an alteration in the number of a note of the Bank of England is not such a material alteration as to enable the bank to refuse payment of the same to a *bona fide* purchaser for value without notice.<sup>4</sup>

If a person or his agent draw a check in such a careless manner as to make it easily alterable from one amount to another, the drawer must bear the loss occasioned by the payment of the same.<sup>5</sup> But if a person should sign a check thus carelessly drawn by his clerk, it would seem that he would have no right of action against the latter, for his carelessness in signing the check in such a condition would be as great as filling up the check in a negligent manner.<sup>6</sup>

The court will not order the production of checks alleged by the defendant to be forgeries for the sake of comparing the handwriting with a document about the genuineness of which the parties are at issue.<sup>7</sup> Where a forged check is passed into a bank for payment, it has a right to retain it.<sup>8</sup>

<sup>1</sup> Gloucester Bank vs. Salem Bank, Ex. 183; Roberts vs. Tucker, 16 Q. B. 560; 20 L. J. Q. B. 270; Swan vs. North-British Australasian Co. 2 H. & C. 175; 32 L. J. (Ex.) 273.

<sup>2</sup> Hall vs. Fuller, 5 B. & C. 750; 8 D. & R. 464.

<sup>3</sup> Vance vs. Lowther, L. R. 1 Ex. Div. 176.

<sup>4</sup> Suffell vs. Bank of England, 24 Ab. L. J. 512.

<sup>5</sup> Young vs. Gote, 4 Bing. 253; Halifax Union vs. Wheelwright, L. R. 10

<sup>6</sup> Whitman vs. Wilks, 3 C. & P. 364.

<sup>7</sup> Wilson vs. Thornbury, 22 W. R. 509; L. R. 17 Eq. 517.

<sup>8</sup> Brown vs. Livingston, 8 U. C. L. J. 124.



And where an agent to whom such a check is sent for collection passes it to the bank for payment, and the bank retains it, the agent has not parted with it by any wrongful act so as to make him liable to the owner for its detention.<sup>1</sup>

An endorsement of a check by a person "as agent" purports to be an endorsement by the payer within 16 and 17 Vict. c. 59, § 19, so as to protect the banker who has paid it, though the person by whom such endorsement was made has no authority to endorse.<sup>2</sup>

Other negotiable instruments may be enumerated as follows:

4. *United States bonds.* These bonds are issued by the Secretary of the Treasury under authority of acts of Congress, and are negotiable.<sup>3</sup> There is no doubt that genuine Treasury notes form part of the negotiable commercial paper of the country;<sup>4</sup> and that when the United States become parties to commercial paper they incur just the same responsibilities as private persons under the same circumstances.<sup>5</sup>

In *Seybel vs. National Currency Bank*,<sup>6</sup> United States bonds were held to be negotiable, so that a dealer in them was not bound to ask any questions whatever from one offering them for sale, and that omission to examine notices affecting them left at his office was not enough to prove bad faith.

5. *Bonds of foreign governments* also may be negotiable. It is so held of Prussian bonds in England.<sup>7</sup>

Bonds are generally so distinctive and invariable that it can be said of them, as a class, that they are negotiable. But they are not negotiable unless they possess the elements of nego-

<sup>1</sup> *Brown vs. Livingston*, 8 U. C. L. J. 124.

<sup>2</sup> *Charles vs. Blackwell*, L. R. 1 C. P. D. 548; 2 C. P. D. 151.

<sup>3</sup> *Cooke vs. United States*, 12 Blatchf. 43, rev'd 91 U. S. 389.

<sup>4</sup> *Vermilye vs. Express Co.* 21 Wall. 138.

<sup>5</sup> *United States vs. Bank of Metropolis*, 15 Pet. 377; *The Floyd Acceptances*, 7 Wall. 666.

<sup>6</sup> 54 N. Y. 288.

<sup>7</sup> *Gorgier vs. Milville*, 3 B. & C. 45.

tiability, *e. g.*, East India bonds;<sup>1</sup> but these were made so by a statute passed in the reign of George the Third.<sup>2</sup>

6. *Scrip of foreign governments* is also negotiable because treated as such in the stock markets.<sup>3</sup>

7. *Municipal bonds* are usually in negotiable form like promissory notes.

8. *State bonds.*<sup>4</sup>

9. *County bonds.*<sup>5</sup>

10. *City bonds.*<sup>6</sup>

11. *Village bonds.*<sup>7</sup>

12. *Railroad bonds.*<sup>8</sup> And the purchaser of such bonds in open market in the ordinary course of business is not bound to a close and critical examination of them to escape the imputation of bad faith.<sup>9</sup> In the State of New York, a railroad bond payable to bearer may be made non-negotiable by endorsing thereon and subscribing a statement that the same is the property of the owner.<sup>10</sup>

13. *Certificates of deposit.*<sup>11</sup>

14. *Coupons.* It was a disputed point at first whether coupons were negotiable; and in the case of Jackson vs. Y. & C. Railroad, Co.<sup>12</sup> it was held, against the dissenting opinion of

<sup>1</sup> Glyn vs. Baker, 13 East, 509.

<sup>2</sup> 51 Geo. III. c. 64, § 4.

<sup>3</sup> Goodwin vs. Robarts, L. R. 1 App. Cas. 476, followed in Rumball vs. Metropolitan Bank, L. R. 2 Q. B. Div. 194; 46 L. J. Q. B. 346.

<sup>4</sup> State of Ill. vs. Delafield, 8 Paige, 527, aff'd 2 Hill, 159.

<sup>5</sup> Colson vs. Arnot, 57 N. Y. 253.

<sup>6</sup> Dutchess etc. Ins. Co. vs. Hachfield, 73 N. Y. 226; Elizabeth City vs. Force, 29 N. J. L. 587.

<sup>7</sup> Bank of Rome vs. Village of Rome, 19 N. Y. 20.

<sup>8</sup> Welch vs. Sage, 47 N. Y. 143; Brainard vs. N. Y. etc. R. R. Co. 25 N. Y. 496; Murray vs. Lardner, 2 Wall. 110; Fisher vs. Morris, 3 Am. Law Reg. 423.

<sup>9</sup> Birdsall vs. Russell, 29 N. Y. 220.

<sup>10</sup> L. 1871, ch. 84, § 1.

<sup>11</sup> Miller vs. Austen, 13 How. (U. S.) 218; Pardee vs. Fish, 60 N. Y. 265; Bank vs. Farnsworth, 18 Ill. 563; Carey vs. McDougald, 7 Ga. 84; Welton vs. Adams, 4 Cal. 37. It is different in Pennsylvania; and Patterson vs. Poindexter, 6 W. & S. 227, is by its own admission contrary to Miller vs. Austen, supra, but is followed and affirmed by Lebanon Bank vs. Mangan, 28 Pa. St. 452; and the endorsee of such a certificate cannot sue in his own name (London Sav. Society vs. Savings Bank, 36 Pa. St. 498).

<sup>12</sup> 48 Me. 147.

Goodenow J., that an action could not be maintained by an assignee upon interest coupons not containing negotiable words. But the Supreme Court of the United States, in the case of *Com'rs of Knox Co. vs. Aspinwall*,<sup>1</sup> fully sustained their negotiability, as did the Supreme Court of Pennsylvania,<sup>2</sup> though in both of these cases the coupons were in negotiable terms. Since which time the courts have universally declared them negotiable, if negotiable in form and not matured.<sup>3</sup>

Coupons are in form and terms nothing else than promissory notes, and their negotiability is a question of law to be determined from the instruments themselves, by the same fixed and well-settled rules which apply to promissory notes;<sup>4</sup> and they are entitled to days of grace, the same as promissory notes, so that a purchaser of them before expiration of the days of grace is a purchaser before maturity.<sup>5</sup> Their negotiability is not affected by detaching them from the bonds, and the holder may recover upon them without producing the bonds;<sup>6</sup> and yet a coupon in the ordinary form is but a repetition of the contract which the bond itself makes for the payment of interest, and simply a device for the convenience of the holder; and is therefore so far aided and protected by the bond that it was at one time understood not to be barred by limitation unless the bond also was so barred.<sup>7</sup>

But in the case of *Clark vs. Iowa City* \* the court held that

<sup>1</sup> 21 How. U. S. 539.

<sup>2</sup> *Beaver vs. Armstrong*, 44 Pa. St. 63.

<sup>3</sup> *Evertson vs. Nat. Bank*, 66 N. Y. 14; *Murray vs. Lardner*, 2 Wall. 110; *Gelpcke vs. Dubuque*, 1 id. 175; *Meyer vs. Muscatine*, 1 id. 385; *Gilbough vs. Norfolk & Petersburg R. R. Co.* 1 *Hughes* (U. S.), 410; *Morris Canal & Bank Co. vs. Lewis*, 12 N. J. Eq. 323; *Same vs. Fisher*, 9 id. 667; and see *Green's Brice's Ultra Vires* (2d ed.), 270, where authorities are collected.

<sup>4</sup> *Jackson vs. Y. & C. R. Co.* 48 Me. 147; *Spooner vs. Holmes*, 210 Mass. 503; *Evertson vs. Nat. Bank*, 66 N. Y. 14.

<sup>5</sup> *Id.*

<sup>6</sup> *Knox County vs. Aspinwall*, 21 How. (U. S.) 539; *Beaver County vs. Armstrong*, 44 Pa. 63; *Thompson vs. Lee County*, 3 Wall. 327.

<sup>7</sup> *The City vs. Lamson*, 9 Wall. 477; *Lexington vs. Butler*, 14 id. 282.

<sup>8</sup> 20 Wall. 583; *Amy vs. Dubuque*, 93 U. S. 470.

when dissevered from the bond coupons were subject to the Statute of Limitations, and that it began to run from their dates. The court said: "Coupons for the different instalments of interest are usually attached to these bonds in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims. They do not lose their validity if for any cause the bonds are cancelled or paid before maturity, nor their negotiable character, nor their ability to support separate actions; and the amount for which they are issued draws interest from their maturity. Every consideration, therefore, which gives efficacy to the Statute of Limitations should be applied to actions upon the coupons after their maturity. . . . All statutes of limitation begin to run when the right of action is complete; and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, while a complete right of action upon such claims exists in the holder. But, if coupons not negotiable in form are detached from the bonds, the negotiability of the latter is not communicated to them."<sup>1</sup>

It has been held that, where bonds and coupons issued to *bona fide* holders for value are valid by the judicial decisions of a State when issued, their validity in such hands should not be allowed to be impaired by a change of decision;<sup>2</sup> and any such judicial oscillation was censured by the Supreme Court of the United States in *Gelpcke vs. Dubuque*.<sup>3</sup>

In England these coupons and interest warrants are held to be promissory notes and negotiable according to the same rules.<sup>4</sup>

<sup>1</sup> *Evertson vs. Nat. Bank*, 66 N. Y. 14.      <sup>4</sup> *Ex parte Colborne*, L. R. 11 Eq. 478; *Ex parte City Bank*, L. R. 3

<sup>2</sup> *The City vs. Lamson*, 9 Wall. 477. Ch. App. 758.

<sup>3</sup> 1 Wall. 175, 206.

Interest runs on coupons from their maturity;<sup>1</sup> and although detached from the bonds, they are still liens under the mortgage given to secure the same, whether the holders are entitled to a *pro rata* distribution or are entitled to payment in the order in which the coupons fall due.<sup>2</sup>

The purchaser in good faith for value of overdue coupons from negotiable bonds that have been stolen acquires no title against the owner of the bonds, although the bonds were stolen before the coupons were due.<sup>3</sup>

15. *Bills of lading* are commercial instruments of a qualified negotiability; they are not purely negotiable either in form or substance. A bill of lading is twofold: it is both a receipt and a contract—a receipt by the carrier for goods shipped, and a contract to transport and deliver them at their place of destination.<sup>4</sup> As a receipt, it is like all other receipts—not conclusive as between the parties thereto, but may be contradicted and modified by parol evidence;<sup>5</sup> as a contract, it is conclusive.<sup>6</sup>

A bill of lading is the representative of property, and operates in the transportation of it, as a bill of exchange is the representative of money and operates in the transfer of it. Where goods are shipped and the carrier or his agent gives to the consignor a bill of lading, it is common for the latter to draw on the consignee, and, attaching the bill of exchange to the bill of lading, send them on together<sup>7</sup>—the one represent-

<sup>1</sup> See cases collected in Green's & El. 29; Goodrich vs. Norris, 1 Ab. Brice's Ultra Vires, 270. Adm. 196; The Bark Olbers, 3 Benedict (U. S.), 148.

<sup>2</sup> Green's Brice's Ultra Vires, 271.

<sup>3</sup> Hinckler vs. Merchants' Nat. Bank, Mass. S. J. C. (April, 1881), 24 Alb. L. J. 436.

<sup>4</sup> The Delaware, 14 Wall. 579, 600.

<sup>5</sup> Meyer vs. Peck, 28 N. Y. 590;

The Lady Franklin, 8 Wall. 325; Blanchet vs. Powells etc. Co. L. R. 9 Ex. 74; Berkley vs. Watling, 7 Ad.

<sup>6</sup> Creery vs. Holly, 14 Wend. 26; The Delaware, 14 Wall. 579; The Wellington, 1 Biss. 279; Fraser vs. Telegraph etc. Co. L. R. 7 Q. B. 566.

<sup>7</sup> First Nat. Bank vs. Shaw, 61 N. Y. 283; Farmers' etc. Bank vs. Atkinson, 74 id. 587.

ing the property and the other the price of it, or money. A bill of exchange or promissory note is never in terms an engagement to deliver property; a bill of lading is never a contract to pay money; and herein is a radical distinction which must forever prevent the latter from ranking with the former as a purely negotiable instrument, because, as we have before seen, an engagement to *pay money* is an essential quality of negotiability. As a matter of fact, bills of lading are, for the protection of the consignor and for other reasons, often made conditional; and a condition, as before seen, is fatal to negotiability. Further, bills of lading are mixed contracts, and cannot be fully assimilated to a clean, absolute, single, definite engagement like that of a bill of exchange. Lord Loughborough noticed this distinction in the celebrated case of *Mason vs. Lickbarrow*<sup>1</sup> in an opinion which Chancellor Kent says “completely overturned the doctrine of the negotiability of bills of lading.”<sup>2</sup> Lord Loughborough says: “Bills of exchange can only be used for one given purpose—namely, to extend credit by a speedy transfer of the debt which one person owes to another to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be endorsed to the true owner of the goods by the freighter, who acts merely as his servant; they may be endorsed to a factor to sell for the owner; they may be endorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do and sometimes do not express on whose account and risk the goods are shipped; they often, especially in war, express a false account and risk. They seldom, if ever, bear upon the face of them any indication of the purpose of the endorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the endorsement of bills of exchange.”

<sup>1</sup> 1 H. Bl. 357, rev'g 2 T. R. 63.

<sup>2</sup> 2 Kent Comm. 548.

In this country, a bill of lading was not negotiable so as to enable the endorsee or consignee to maintain an action thereon in his own name—the effect of the endorsement being to transfer the right of property, but not the contract,<sup>1</sup> unless, at all events, the bill of lading was made out on the account of or in the name of the consignee;<sup>2</sup> but in the State of New York, since the adoption of the Code of Procedure, the transferee of a bill of lading has a right of action on the contract which it contains.<sup>3</sup> And the same is the case in England since 18 and 19 Vict. c. 3. In the primary meaning of negotiability, therefore, as explained by the Supreme Court of the United States in the recent case of *Shaw vs. Railroad Company*—viz., a capability of being transferred by endorsement and delivery so as to give the transferee a right of action in his own name—bills of lading are now no doubt very generally negotiable by force of statute.

It cannot be denied that often, since the case of *Mason vs. Lickbarrow*, bills of lading have been judicially declared to be negotiable, but not in the same sense that bills of exchange are,<sup>4</sup> and in opinions of the greatest authority the contrast is broadly made. Thus, even in *Dows vs. Greene*,<sup>5</sup> in which *Dows vs. Perrin*<sup>6</sup> was in a measure questioned, Smith, J., says, “A bill of lading, doubtless, is not negotiable like a bill of exchange;” and in the leading case of *Gurney vs. Behrend*,<sup>7</sup> Lord Campbell says, in delivering judgment, that “a bill of lading is not like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee, for a valuable consideration, without regard to the title of the parties who make the transfer.”

<sup>1</sup> *Thompson vs. Dominy*, 14 M. & W. 403; *Howard vs. Shepherd*, 9 C. B. 297; *Waring vs. Cox*, 1 Campb. 369. See *Birehead vs. Brown*, 5 Hill, 634.

<sup>2</sup> *Dows vs. Cobb*, 12 Barb. 310.

<sup>3</sup> *Merchants' Bank vs. Union R. R. etc.* Co. 69 N. Y. 379.

<sup>4</sup> 101 U. S. 557, 563.

<sup>5</sup> *Dows vs. Perrin*, 16 N. Y. 325, 333.

<sup>6</sup> 24 N. Y. 638.

<sup>7</sup> *Supra*.

<sup>8</sup> 3 El. and Bl. 622.

And even where a statute enacts that "bills of lading shall be negotiable and may be transferred by endorsement and delivery," as in Pennsylvania, or goes further and declares that they shall be negotiable by endorsement and delivery in the same manner as bills of exchange and promissory notes, as in Missouri, it is not to be assumed that all the effects and consequences of the negotiability of bills of exchange will result from the transfer of bills of lading to *bona fide* purchasers.<sup>1</sup> Inasmuch as a bill of lading is the mere symbol and representative of the property specified in it, the holder of the representative thing ought to have no greater rights or fuller protection than if he had the thing represented, and he has not; and this is the view presented in *Mason vs. Lickbarrow*.<sup>2</sup>

It is well settled that the thief of a bill of lading cannot give a good title to it to a *bona fide* purchaser.<sup>3</sup>

It is put beyond doubt, by recent decisions in the State of New York, that, if a bill of lading for goods is issued to one who has no right to it or authority from the owner to receive it, a *bona fide* endorsee for value of such bill is not protected as against the claims and equities of the owner.<sup>4</sup> In the last-cited case the *bona fide* endorsee for value of false bills of lading—that is, bills issued without goods being shipped—got possession in due course of the goods, but could not hold them as against the owner, the latter having done no act which estopped him.<sup>5</sup> The general result of the cases is that the owner of property tortiously taken from him is not estopped from reclaiming it by the fraudulent act of the tortious taker, to

<sup>1</sup> *Shaw vs. R. R. Co.* 101 U. S. 557.

<sup>2</sup> 1 H. Bl. 360; *Gurney vs. Behrend*, 3 El. & Bl. 622.

<sup>3</sup> *Shaw vs. R. R. Co.* supra; *Brower vs. Peabody*, 13 N. Y. 121.

<sup>4</sup> *Marine Bank vs. Fiske*, 71 N. Y. 353.

<sup>5</sup> The same principle is involved in *Dows vs. Nat. Exch. Bank*, 91 U. S. 618; *Bank of Rochester vs. Jones*, 4 N. Y. 497; *Jenkyns vs. Brown*, 14 Q. B. 496. And see *Dows vs. Perrin*, 16 N. Y. 335; see *Barnard vs. Campbell*, 55 id. 456, and *Whistler vs. Forster*, 14 C. B. (n. s.) 248.



which he is not a party, or by a fraud which he has not facilitated, and may pursue his title even against a *bona fide* purchaser or endorsee of a bill of lading;<sup>1</sup> and the exception is that if the owner does some act by which another is clothed with the apparent title or right of disposal, and is thereby enabled to practise a fraud upon some innocent person dealing with him, the owner is thereby estopped from pursuing his title against such defrauded person.<sup>2</sup>

There is another very numerous class of cases in which bills of lading are not negotiable, and do not afford the protection of negotiable paper to endorsees for value. If goods are not paid for when shipped, the consignor often takes the bill of lading to his own order, or the order of a bank which discounts his draft on the consignee. In such a case the bill of lading and draft are attached and sent on together, and that is notice to the consignee that his receipt of the bill is upon condition of his accepting the draft; and if he gets possession of the former without acceptance of the latter, he thereby acquires no title to the property, and can give none which will defeat the consignor or bank, even to an endorsee or transferee for value, because the bill of lading itself, its condition and circumstances are ordinarily sufficient notice to all who deal with the consignee that he has no right to the same.<sup>3</sup>

The New York Factors' Act<sup>4</sup> provides that a factor or agent intrusted with a bill of lading shall be considered the owner of the goods therein specified, so far as relates to contracts made by him with third persons acting on the faith

<sup>1</sup> *Marine Bank vs. Fiske*, 71 N. Y. iels, 47 id. 631; *Marine Bank vs.* 353; *Barnard vs. Campbell*, 55 id. Wright, 48 id. 1; *Winter vs. Coit*, 7 456; s. c. 58 id. 73; *Hazard vs. Fiske*, id. 288; *Holmes vs. German Security Bank*, 87 Pa. St. 525; *Emery vs. Irving Nat. Bank*, 25 Ohio St. 360; 18 Hun, 277.

<sup>2</sup> *Voorhis vs. Olmsted*, 66 N. Y. 113; *Pickering vs. Busk*, 15 East, 38. *Dows vs. Nat. Exch. Bank*, 91 U. S.

<sup>3</sup> *Farmers' etc. Bank vs. Logan*, 74 618.  
N. Y. 568; *Cayuga etc. Bank vs. Dan-* \* L. 1830, ch. 179, § 3.

of the bill of lading; but this act applies only where the relation of principal and agent exists between the real owner and the one having the bill in possession '—that is, the factor cannot get a title or authority from one who is not the true owner, which will make the bill of lading negotiable in his hands so that the transfer of it by him to a *bona fide* endorsee for value will cut off the rights and equities of the owner.<sup>2</sup> The Factors' Act only applies where the owner consents to the shipment of goods in the name of a third person; and he does not forfeit his property by a mere neglect to take all precautions against a fraud upon his rights and title.<sup>3</sup> And the act does not apply unless such third person has the exclusive possession of the goods separate and distinct from the owner's;<sup>4</sup> nor does it apply where the principal directs the goods to be shipped in his own name and the agent wrongfully ships them in his.<sup>5</sup>

It is provided in the laws of New York<sup>6</sup> that a bill of lading may be transferred by endorsement, and the person to whom it is transferred is deemed to be the owner of the property therein specified, so far as to give validity to a pledge or transfer thereof by him. The legislature thereby intended to impart to bills of lading certain attributes of negotiability, as is evident also from the further provision that bills of lading having "non-negotiable" written across their face are excepted. And yet it seems these laws are of no broader scope than the Factors' Act before referred to; and that act, as already shown, has been very much limited by construction in our highest courts. And certainly these laws bestow no larger grant of negotiability upon bills of lading than the Missouri

<sup>1</sup> First Nat. Bank vs. Shaw, 61 N. Y. 283.

<sup>2</sup> Id.

<sup>3</sup> Covell vs. Hill, 6 N. Y. 374, aff'g

<sup>4</sup> Denio, 323.

<sup>5</sup> Hazard vs. Fiske, 18 Hun, 277.

<sup>6</sup> L. 1858, ch. 328, as amended by

<sup>7</sup> Florence Sewing-machine Co. vs. Warford, 1 Sweeney (N. Y.), 433.

and Pennsylvania statutes before mentioned ; yet the Supreme Court of the United States<sup>1</sup> has held that those statutes do not by any means place bills of lading upon an equality with bills and notes in respect to negotiability. Whether the New York courts will follow this construction remains to be seen. While, therefore, bills of lading do not at the present time possess in their full extent the circulating qualities of bills of exchange, yet it cannot be denied that the range of negotiability is gradually becoming broader, and from the same cause which at first gave it existence—viz., the custom of merchants. This is well illustrated by the leading English case<sup>2</sup> before referred to, where the scrip of a foreign government containing a promise not to pay money, but to give a bond, was held to be negotiable, and pass by mere delivery because it was so treated in the stock market.

*(e.) Results of Negotiability; Bona Fide Holder; Notice; Value.*

1. *Results of Negotiability.*—The change in the law which we have indicated, making choses in action assignable, so that the assignee might sue and enforce the same in his own name, if it had stopped there would not have accomplished much. What the commercial necessities of England required was that negotiable securities should pass from hand to hand, free from all restrictions and conditions ; that they should become representatives of money ; and that every person accepting or receiving them should be entitled to collect them, without being subject to impediment or hinderance on the part of the maker, except his financial ability. And, growing out of this necessity of commerce, we have now firmly established in law the main and principal result of negotiability, and which is often erro-

<sup>1</sup> Shaw vs. R. R. Co. 101 U. S. 557.

<sup>2</sup> Goodwin vs. Robarts, L. R. 1 App. Cas. 476.

neously confounded with the doctrine of negotiability itself<sup>1</sup>—viz., that a purchaser or transferee in good faith for value, and before maturity of a negotiable instrument, is not affected by any latent equities between the original parties, or in favor of third persons, unless they are brought to his notice. And in law this extensive privilege is commonly designated as “the rights of a *bona fide* holder or purchaser.”<sup>2</sup> But, to bring one within the protection of this broad rule, it is necessary that certain conditions should exist in his favor, the nature of which we shall now proceed to examine briefly.

He must be a purchaser, 1st, in good faith without notice; 2d, before maturity; 3d, for value.

1st. *He must be a purchaser in good faith without notice.* For if he have notice that there are defects in the title of his assignor, or the party from whom he receives the negotiable paper, it follows that he is not entitled to avail himself of the protection afforded by the rule in question, and no commercial necessity would seem to require that he should receive such protection. Express or actual notice would bar his rights as a *bona fide* holder,<sup>3</sup> and leave the maker to assert any defence to the paper which existed in his favor. But the numerous cases on this extensive subject have mainly arisen in attempts to fix upon the holder *constructive* notice of defects, and the courts have experienced no small difficulty in applying the familiar doctrine to the facts. The form and condition of a negotiable instrument are of themselves constructive notice to the purchaser. Constructive notice to a person is the imparting to him of sufficient information to put him upon inquiry; and the true rule as to the meaning of “put upon inquiry” is declared<sup>4</sup> to be, that the rights of a purchaser of negotiable paper are not affected by constructive no-

<sup>1</sup> See distinctions set forth in Shaw vs. R. R. Co. *supra*.

<sup>3</sup> Cass County vs. Green, 66 Mo. 498.

<sup>4</sup> Birdsall vs. Russell, 29 N. Y.

<sup>2</sup> Brown vs. Spofford, 95 U. S. 474. 220.

tice of a defect of title, unless it clearly appears that the inquiry suggested by the fact disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect. In that case it was held that, the number of a bond not being an integral part of it, an erasion and alteration of the number was not constructive notice that the bond had been stolen; and for the further reason, also, that the line of inquiry suggested by the fact of alteration would not, if pursued, lead to the detection of the larceny. Such notice as will put a prudent man on his guard is not enough, *e. g.*, the absence of certificates referred to in the bond.' In fact, clear knowledge of fraud must be proved on the part of the holder, and is not to be presumed on slight evidence; and, if the evidence is but slight, the court may withdraw it from jury.<sup>2</sup>

If no actual notice of incipient fraud is given to the intending purchaser of a note, he is not affected by notice that the payee promised not to negotiate it, and by an indefinite notice that he is buying a lawsuit, and he is not thereby put upon inquiry for a fraud which actually entered into the incipency of the note; that is, no complicity in fraud is ever to be presumed as against a holder for value of negotiable paper.<sup>3</sup> Even though he does not pay full value and there may be enough to excite suspicion, his title is not thereby impaired.<sup>4</sup>

It is a general rule that persons dealing with property are bound to take notice of any suit pending with respect to its title,<sup>5</sup> even though not themselves parties to it; but it seems that it is the *pendency* of the suit which creates the notice, so that after the cause is ended the decree is not notice.<sup>7</sup>

Negotiable paper not due is, however, excepted from the

<sup>1</sup> Welch vs. Sage, 47 id. 143.

<sup>5</sup> Murray vs. Balou, 1 Johns. Ch.

<sup>2</sup> Battles vs. Laudenslager, 84 Pa. 566; Garth vs. Ward, 2 Atk. 174.

St. 446.

<sup>6</sup> Bishop of Winchester vs. Paine,

<sup>3</sup> Heist vs. Hart, 73 Pa. St. 286.

11 Ves. 194.

<sup>4</sup> Cromwell vs. County of Sac, 96 U. S. 51.

<sup>7</sup> Worsley vs. Scarborough, 3 Atk. 391.

general rule, because of the high favor in which it is held as a circulating medium, unless there is actual notice of the suit.<sup>1</sup>

The question arose in the case of *Leitch vs. Wells*<sup>2</sup> whether a purchaser of certificates of stock was affected by the pendency of a suit, and the court held in conformity with the above views, *Earl, C.*, saying: "Since the decision of the case of *McNeil vs. Tenth National Bank*, above cited, certificates of stock, with blank assignments and powers of attorney attached, must be nearly as negotiable as commercial paper. The doctrine of constructive notice by *lis pendens* has never yet been applied to such property. This doctrine must have its limitations. It could not be applied to ordinary commercial paper, nor to bills of lading, nor to government or corporate bonds payable to bearer. Indeed, I do not find that it has ever been applied, and I do not think it ought to be applied, to any of the articles of ordinary commerce. Public policy does not require that it should be thus applied. On the contrary, its application to such property would work great mischief and lead to great embarrassments."

If a first endorsee for value takes without notice of any prior equities, a second endorsee for value takes a good title, although he had notice of such equities. As was declared by *Field, J.*,<sup>3</sup> "the rule has been too long settled to be questioned now, that whenever negotiable paper has passed into the hands of a party unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity." In such case the second endorsee takes a new title from the first endorsee, and there-

<sup>1</sup> *Orleans vs. Platt*, 99 U. S. 676, 18; and see *Leitch vs. Wells*, 48 N. 683; *County of Warren vs. Marcy*, Y. 585.

<sup>2</sup> *Id.* 96; *Winston vs. Westfeldt*, 22 Ala. 760; *Stone vs. Elliott*, 11 Ohio St. 252; *Mims vs. West*, 38 Ga. U. S. 51.

<sup>3</sup> *Supra.*

*Cromwell vs. County of Sac*, 96

fore knowledge of any infirmities in the old title does not affect him.<sup>1</sup>

The rights of a holder of a negotiable instrument are to be determined by the simple test of honesty and good faith; he is not bound to be on the alert for circumstances which might excite suspicion.<sup>2</sup>

The possession of an instrument, endorsed in blank or made payable to bearer, is *prima facie* evidence that the holder is the owner and lawful possessor of the same; and no degree of negligence, and nothing short of fraud on his part, is sufficient to overcome the effect of that evidence and invalidate his title.<sup>3</sup>

In *Dutchess Co. Ins. Co. vs. Hatchfield*,<sup>4</sup> New York Brokers bought Poughkeepsie bonds which had been stolen. The circumstances which were charged against them, indicating bad faith, were—1st, that they had bought a bond before from the same party which had turned out to be stolen; and, 2d, that, instead of offering the bonds in New York city, they took them to Poughkeepsie and Albany. The Brokers having proved that they had received an explanation of the first transaction of the stolen bond, and having offered to prove a usage of Brokers consistent with their own course in offering the bonds for sale, they were sustained in their possession of and title to the bonds, and Church, C. J., laid down the rule applicable to such cases as follows: "It is not sufficient that a prudent man would be put upon inquiry, nor that the purchaser was negligent, nor that he did not exercise a proper degree of caution. A purchaser of such securities will be

<sup>1</sup> Commissioners, etc. vs. Clark, 94 U. S. 278, 286; Riley vs. Schawacker, 50 Ind. 592; Morner vs. Cooper, 35 Iowa, 257; Simon vs. Merritt, 33 id. 537; Woodman vs. Churchill, 52 Me. 58; Roberts vs. Lane, 64 id. 108; Woodworth vs. Huntoon, 40 Ill. 131; May vs. Chapman, 16 M. & W. 355; Masters vs. Ibberson, 8 C. B. 100.  
<sup>2</sup> Magee vs. Badger, 34 N. Y. 247.  
<sup>3</sup> Goodman vs. Harvey, 4 Ad. & El. 870.  
<sup>4</sup> 73 N. Y. 226.

protected if he is honest and believes that the seller has a good title."

*Seybel vs. Nat. City Bank*<sup>1</sup> was a case, to say the least, of gross negligence and reckless disregard of others' rights. Bonds were stolen from the plaintiff in the evening; the next morning he served printed notices of the theft, with description of the property, at defendant's office, and on their cashier, who said they did not care for notice; the same day defendants bought the stolen bonds; and on their testimony that they did not examine the notice, and had no time to examine such notices, the court sustained them, and adopted the rule laid down in the leading case of *Goodman vs. Simonds*,<sup>2</sup> to wit: "Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part."

In *Goodman vs. Simonds*,<sup>3</sup> this subject is fully considered, English and American cases examined, and *Goodman vs. Harvey*<sup>4</sup> referred to as the leading case in England. In the case last cited, Lord Denman said: "We are all of opinion that gross negligence only would not be a sufficient answer where a party has given consideration for the bill."

The case of *Gill vs. Cubitt*,<sup>5</sup> laying down the doctrine that the purchaser of negotiable paper must exercise ordinary care and prudence, is overruled both in England and in this country. It stands alone.<sup>6</sup>

The title and rights of a *bona fide* purchaser of negotiable paper are not affected by the fact that the person from whom

<sup>1</sup> 54 N. Y. 288.

<sup>2</sup> 20 How. (U. S.) 343.

<sup>3</sup> *Supra*.

<sup>4</sup> 4 Ad. & El. 870.

<sup>5</sup> 3 B. & C. 466.

<sup>6</sup> *Belmont Branch Bank vs. Hoge*, 35 N. Y. 65; *Goodman vs. Harvey*, *supra*; *Uther vs. Rich*, 10 Ad. & El. 784; *Arboun vs. Anderson*, 1 Q. B. 498, 504.



he received it before maturity had possession of it for a specific purpose and misappropriated it,<sup>1</sup> nor by the fact that the apparent owner from whom he bought it was an agent who sold it in breach of his duty to his principal.<sup>2</sup>

The presumption is that the holder of negotiable paper has paid value for it in the usual course of business.<sup>3</sup> So that, in bringing suit on it, all he has to do in opening is to prove the signature and introduce it in evidence.<sup>4</sup>

Ordinarily, it is no defence against a *bona fide* holder of a note that the maker was induced to sign it by fraud;<sup>5</sup> and a thief of negotiable paper can give a good title to it to a *bona fide* purchaser;<sup>6</sup> but it is otherwise as to non-negotiable paper.<sup>7</sup> But if a negotiable note is stolen before delivery by the maker, it has no inception, and the thief can give no title.<sup>8</sup>

Negotiable paper in the hands of an innocent holder is not invalidated by an illegal consideration unless expressly declared void by statute.<sup>9</sup>

If a person buys from a pretended owner, who is not in possession, he is not a *bona fide* purchaser, and takes no better title or greater rights than the vendor;<sup>10</sup> nor is he if he buys from a known agent who endorses it without authority;<sup>11</sup> nor will he be made so by the principal's ratification of the endorsement after maturity.<sup>12</sup>

## 2. *He must be a purchaser before maturity.*

The fact that a bill or other instrument is overdue is equiva-

<sup>1</sup> Collins vs. Gilbert, 94 U. S. 753; Seybel vs. Nat. City Bank, 54 id. 288; Park Bank vs. Watson, 42 N. Y. 490. Birdsall vs. Russell, 29 id. 220; Col-

<sup>2</sup> Belmont Branch Bank vs. Hoge, supra. son vs. Arnot, 57 id. 253; Peacock vs. Rhodes, 2 Doug. 633; Miller vs. Race, 1 Burr. 452.

<sup>3</sup> Goodman vs. Simonds, 20 How. 343; Pittsburgh Bank vs. Neal, 22 id. 96; Murray vs. Lardner, 2 Wall. 110.

<sup>7</sup> Ledwich vs. McKim, 53 N. Y. 307.

<sup>8</sup> Hall vs. Wilson, 16 Barb. 548.

<sup>4</sup> Pettee vs. Prout, 69 Mass. 502; Agra, etc. Bank vs. Leighton, L. R. 2 Ex. 61.

<sup>9</sup> Grimes vs. Hillenbrand, 4 Hun, 354.

<sup>10</sup> Muller vs. Pondir, 55 N. Y. 325.

<sup>5</sup> Fenton vs. Robinson, 4 Hun, 252.

<sup>11</sup> Gilbert vs. Sharp, 2 Lans. 412.

<sup>6</sup> Welch vs. Sage, 47 N. Y. 143;

<sup>12</sup> Id.

lent to notice of all facts relating to it; thus, where a note was endorsed after maturity, the maker, being sued, was allowed to defend himself by showing that he had paid it to the original payee.<sup>1</sup> If there is any fact relating to a bill, notice of which would disentitle a holder who took the bill before maturity, the existence of such a fact disentitles a holder who takes the bill after maturity irrespective of notice.<sup>2</sup> In other words, if a note is negotiated when overdue, the maker, when sued by the endorsee, may set up any equitable defence which he had against the payee.<sup>3</sup>

The taker of an overdue note is but the assignee of a chose in action, and takes only such title as his assignor had.<sup>4</sup>

Instruments not payable on demand mature with the last day of grace.<sup>5</sup> An accommodation note transferred on the last day of grace by the payee to plaintiff, during banking hours, as collateral security for an indebtedness of the payee and to be applied thereon, makes the plaintiff a *bona fide* holder before maturity.<sup>6</sup> An instrument payable in instalments is deemed wholly overdue when any instalment is overdue;<sup>7</sup> but not from the mere fact that interest is overdue,<sup>8</sup> though it is held in New York<sup>9</sup> that a note is dishonored by overdue interest.

In *Vermilye vs. Express Company*<sup>10</sup> the Supreme Court of the United States held that bonds and Treasury notes of the

<sup>1</sup> *Brown vs. Davies*, 3 T. R. 80. See *Cripps vs. Davis*, 12 M. & W. 159.

<sup>2</sup> *Lloyd vs. Howard*, 15 Q. B. 995.

<sup>3</sup> *Merrick vs. Butler*, 2 Lans. 103; *Nellis vs. Clark*, 4 Hill, 424; *O'Callaghan vs. Sawyer*, 5 Johns. 118; *Van Valkenburgh vs. Stuppelbeen*, 49 Barb. 99.

<sup>4</sup> *Farrington vs. Park Bank*, 39 Barb. 645; *De Mott vs. Starkey*, 3 Barb. Ch. 403.

<sup>5</sup> *Evertson vs. Nat. City Bank*, 66 N. Y. 14.

<sup>6</sup> *Continental Nat. Bank vs. Townsend*, 13 N. Y. *Week. Dig.* 295; N. Y. Ct. App. Nov. 22, 1881.

<sup>7</sup> *Vinton vs. King*, 86 Mass. 562; *Field vs. Tibbetts*, 57 Me. 358.

<sup>8</sup> *Nat. Bank vs. Kirby*, 108 Mass. 497; *Cromwell vs. County of Sac*, 96 U. S. 51; *Kelley vs. Whitney*, 45 Wis. 110; *Boss vs. Hewitt*, 15 id. 260; *Brooks vs. Mitchell*, 9 M. & W. 15.

<sup>9</sup> *Newell vs. Gregg*, 51 Barb. 263.

<sup>10</sup> 21 Wall. 138.

United States payable to holder or bearer at a future definite time were subject to this principle, and that a purchaser after they were overdue took subject to the rights of antecedent holders.

3. *He must be a holder for value.*

The rule in England seems to be that one who takes a negotiable instrument as a security for a pre-existing debt is a holder for value as well as one who parts with value at the time he takes it;<sup>1</sup> and yet, in *De la Chaumette vs. Bank of England*,<sup>2</sup> it was mentioned as a fact adverse to plaintiff that although the balance was in his favor at the time he received the stolen bank-note, he did not make any further advance or give any further credit on the strength of it; he was considered as an agent rather than a holder for value, and failed to recover against the bank.

It was said in *Currie vs. Misa*,<sup>3</sup> by Lush, J., that he was not aware of any cases directly in point, and the only authority he cited was *Story, Promissory Notes*, § 186.

In England, as in this country, it is likely that an extension of time or the suspension of an existing demand by the taker of a negotiable instrument would make him a holder for value.<sup>4</sup>

The Supreme Court of the United States is supposed to have adopted a similar rule, as laid down in *Swift vs. Tyson*,<sup>5</sup> that one who takes commercial paper as security for any existing debt is a holder for value, and to retain it still, though there has since been in that court no actual adjudication on the precise question; but certainly such cases as are cited below<sup>6</sup> do not go so far, because in them there is an extension

<sup>1</sup> *Currie vs. Misa*, L. R. 10 Ex. 153; *Baker vs. Walker*, 14 M. & W. 248. see *Whistler vs. Forster*, 14 C. B. (n. s.) 465. <sup>5</sup> 16 Pet. 1.

<sup>2</sup> 9 B. & C. 208, 216.

<sup>3</sup> *Supra*.

<sup>4</sup> *Morton vs. Burn*, 7 Ad. & El. 19; 430.

<sup>6</sup> *Oates vs. Nat. Bank*, 100 U. S. 239; *Goodman vs. Simonds*, 20 How. U. S. 343-370; *McCarty vs. Roots*, 21 id.

of time or other forbearance granted to the debtor, which constitutes a parting with present advantage on the part of the creditor.

Swift vs. Tyson has been followed to a great extent in this country;<sup>1</sup> though in some of the cases the important distinction between taking negotiable paper as absolute payment and taking it as a mere security of a pre-existing debt is not kept in view. The same rule is followed in Connecticut on the ground that the taking of negotiable paper as a collateral security is in the ordinary course of business.<sup>2</sup>

In New York a purchaser of negotiable paper *for value* is one who parts with some value, money, property, or existing security, or forbears the exercise of a valuable right at the time he receives it, and as the consideration of its acquisition, *e. g.*, if he makes a loan on a note and at the same time takes the negotiable paper as collateral security,<sup>3</sup> or surrenders a security,<sup>4</sup> or takes negotiable paper in payment of a note already due which he surrenders or cancels,<sup>5</sup> or who receives negotiable paper as absolute payment of any existing indebtedness and not merely as security for its payment;<sup>6</sup> and the last case supposed is stronger if in connection with it he pays present money or value as part consideration;<sup>7</sup> but if a creditor receives negotiable paper from his debtor, it seems that no presumption arises from the mere fact of receiving it that it is taken in absolute payment of the debt.<sup>8</sup>

<sup>1</sup> Fisher vs. Fisher, 98 Mass. 303; Stoddard vs. Kimball, 60 id. 469; Atkinson vs. Brooks, 26 Vt. 569; Holmes vs. Smith, 16 Me. 177; Manning vs. McClure, 36 Ill. 490; and see a very thorough discussion of this subject, endorsing the view laid down in Swift vs. Tyson, 1 Am. Law Rev. (n. s.) 479.

<sup>2</sup> Roberts vs. Hall, 37 Conn. 205.

<sup>3</sup> Bank of New York vs. Vanderhorst, 32 N. Y. 553.

<sup>4</sup> Chrysler vs. Renois, 43 N. Y. 209.

<sup>5</sup> Pratt vs. Coman, 37 N. Y. 440; Brown vs. Leavitt, 31 id. 113; Meads vs. Mer. Bank, 25 id. 143, 149; Youngs vs. Leo, 12 id. 551; Bank of Salina vs. Babcock, 21 Wend. 499; Bank of St. Albans vs. Gilliland, 23 id. 311.

<sup>6</sup> Potts vs. Mayer, 74 N. Y. 594; Bank of Sandusky vs. Scoville, 24 Wend. 115.

<sup>7</sup> Mechanics' etc. Bank vs. Crow, 60 N. Y. 85.

<sup>8</sup> Bradford vs. Fox, 38 N. Y. 289.

The rule laid down in *Coddington vs. Bay*,<sup>1</sup> that in order to be a purchaser for value there must be a parting with present value or with a present advantage, has been followed in this State without shadow of turning; and therefore in New York one who receives negotiable paper merely as security for a debt already existing is not a purchaser or holder for value.<sup>2</sup>

This principle has been rigidly applied to Stock-brokers. In the case in question defendants, Stock-brokers in New York, received from one Van A., residing at Lyons, orders by telegraph to buy Erie stock, he agreeing to send margin. On the day of sending and receipt of telegrams defendants contracted for the stock ordered, to be delivered three days thereafter, at which time they were delivered to and paid for by defendants. On the day of the sending of the telegrams, but whether before or after does not appear, Van A. stole \$6500 of United States coupon bonds belonging to plaintiff, which he forwarded to defendants as a "margin." The bonds were received by the defendants before the delivery of and payment for the stock. In an action for the conversion of the stock, it was decided that defendants gave credit to the promise of Van A. and not to the bonds; that the receipt of the bonds and the fulfilment of the contract for the purchase of the stock after such receipt did not make them *bona fide* holders, and that they were therefore liable; also, that if defendants, after receipt of the bonds, purchased upon the credit thereof any stocks for Van A., they were entitled to hold them as security for any loss arising in that transaction; but the sale of bonds beyond the amount necessary for such indemnity was a conversion for which an action would lie.<sup>3</sup>

<sup>1</sup> 20 Johns. 637.

<sup>2</sup> *Turner vs. Treadway*, 53 N. Y. 650; *Lawrence vs. Clark*, 36 id. 128;

*Bright vs. Judson*, 47 Barb. 29; *Stalker vs. McDonald*, 6 Hill, 93.

<sup>3</sup> *Taft vs. Chapman et al.* 50 N. Y. 415.

In Pennsylvania the rule is the same as in New York.<sup>1</sup> The holder must have paid some present value or relinquished some present advantage.<sup>2</sup>

An accommodation note is an exception to the general rule even in New York, for, if no restriction is made as to the manner in which it is to be used, an endorsee who takes it as security for an existing debt is a holder for value.<sup>3</sup>

It is only where such a note has been diverted from the purpose for which it was intended that it is necessary the holder should have parted with value in order to enforce it.<sup>4</sup> And one who receives such paper without notice of the diversion, in exchange for other collateral paper, is a *bona fide* holder for value, notwithstanding the diversion.<sup>5</sup>

Referring to the conflict of opinion as to what constitutes a holder *for value*, Leonard, J., says<sup>6</sup> that "twenty years of judicial construction have not fully terminated the controversy in this State so ably discussed in the conflicting cases of *Swift vs. Tyson*<sup>7</sup> and *Stalker vs. McDonald*.<sup>8</sup> The case last mentioned was determined in the late Court of Errors; . . . it expressly endorses *Coddington vs. Bay*<sup>9</sup> and *Rosa vs. Brotherston*<sup>10</sup> as the law of this State, and condemns the case of *Swift vs. Tyson*."

The conflict still continues, with no modification of views on either side, except, perhaps, a slight departure from *Swift vs. Tyson* by later cases in the Supreme Court of the United States.<sup>11</sup>

It has been repeatedly held in the State of New York that

<sup>1</sup> *Petrie vs. Clark*, 11 Serg. & R. 377; *Lenheim vs. Wilmarding*, 55 Pa. St. 73; *Bronson vs. Silverman*, 77 id. 94.

<sup>2</sup> *Kirkpatrick vs. Muirhead*, 16 Pa. St. 117.

<sup>3</sup> *Cole vs. Saulpaugh*, 48 Barb. 104; *Maitland vs. Citizens' Nat. Bank*, 40 Md. 540; *Bridgeport Bank vs. Welch*,

29 Conn. 475; *Grocers' Bank vs. Penfield*, 69 N. Y. 502.

<sup>4</sup> *Id.*

<sup>5</sup> *Park Bank vs. Watson*, 42 N. Y. 490.

<sup>6</sup> *Cardwell vs. Hicks*, 37 Barb. 458.

<sup>7</sup> 16 Pet. 1.

<sup>8</sup> 6 Hill, 93.

<sup>9</sup> 20 Johns. 637.

<sup>10</sup> 10 Wend. 85.

<sup>11</sup> But see 1 Am. Law Rev. (n.s.) 479.

the *bona fide* holder of negotiable paper can recover on it only what he paid for it, where there was fraud in its origin, or the maker has other equities.<sup>1</sup>

These decisions are based upon the idea that a holder of negotiable paper is only entitled to protection from loss, and should not be allowed to make a profit out of the maker if the latter has been wronged.<sup>2</sup> Thus in *Stalker vs. McDonald*,<sup>3</sup> Walworth, Ch., says: "This principle of protecting the *bona fide* holder of negotiable paper who has paid value for it is derived from the doctrines of the courts of equity, in other cases where the purchaser has obtained the legal title without notice of the equitable right of a third person to the property. . . . And if he has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*."<sup>4</sup>

On the contrary, in *Cromwell vs. County of Sac*,<sup>5</sup> Field, J., expressed the opinion that a purchaser of a negotiable security before maturity, and not personally chargeable with fraud, is entitled to recover its full amount though he may have paid less than its par value, and whatever may have been its original infirmity. He admitted that there were many adverse decisions, but thought it a sound rule, "and in consonance with the common understanding and usage of commerce, that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker."

And in the very recent case of *Railroad Companies vs. Schutte*,<sup>6</sup> it was held that bonds of the State of Florida in the open market purported to be what they called for; and

<sup>1</sup> *Huff vs. Wagner*, 63 Barb. 215; *Cardwell vs. Hicks*, 37 id. 458; *Youngs vs. Lee*, 18 id. 189, aff'd 12 N. Y. 551. Also *Chicopee Bank vs. Chapin*, 49 Mass. 40; *Stoddard vs. Kimball*, 60 Mass. 469.

<sup>2</sup> *Todd vs. Shelbourne*, 8 Hun, 510.

<sup>3</sup> 6 Hill, 93.

<sup>4</sup> This is the rule in England. *Edwards vs. Jones*, 7 Car. & P. 633.

<sup>5</sup> 96 U. S. 51, 60.

<sup>6</sup> 103 U. S. 118, 145.

that as the "Railroad Companies" had put them out, and in legal effect endorsed them, they must to a *bona fide* holder respond to their endorsement commercially—that is, by paying the bonds according to their face, regardless of what their maker or they themselves may have got for them.<sup>1</sup>

And this seems to be the better rule, and certainly more consonant to the general dealings of Wall Street, where many securities are sold and bought under the par value, upon the expectation of the purchasers that they will eventually obtain their full face value. In concluding this branch of the subject, it will be observed that the Supreme Court of the United States has been foremost in upholding and advancing doctrines which tend to make commercial securities almost unassailable in the hands of innocent purchasers.

## *II. Non-negotiable Instruments.*

### *(a.) Doctrine of Non-negotiability.*

The modern doctrine of non-negotiability is simply this: that while the assignee of a contract or chose in action, by statute or usage, can sue upon the same in law or equity, the action is subject to all of the defences and equities between the original parties, to the same extent and in the same manner as if they were themselves before the court.<sup>2</sup> The effect of this doctrine is, of course, to lower the commercial standing and value of non-negotiable instruments, for the obvious reason that a purchaser of them must beware of what he is buying, for he is chargeable with notice of all defects in the title of his assignor, and of all defences or equities which may exist in favor of the party or corporation against whom he proposes to enforce the same. The cases which we give

<sup>1</sup> Per Waite, C. J.

<sup>2</sup> Davis vs. Bechstein, 69 N. Y. 440.



in the notes fully illustrate the doctrine of non-negotiability.<sup>1</sup>

It is, perhaps, not finally settled whether the assignee of a chose in action takes it subject only to the original equities—that is, the equities between the assignor and the debtor—or subject also to the latent equities of third persons. There are most respectable authorities on both sides of this question, but in the State of New York the weight of opinion at present is in favor of the latter doctrine, that the purchaser of a chose in action must abide the case of the person from whom he buys, for the reason that the holder of a chose in action cannot alienate anything but the beneficial interest he possesses. It is a question of power or capacity to transfer to another, and that capacity is to be exactly measured by his own rights.<sup>2</sup>

<sup>1</sup> In *Davis vs. Bechstein*, 69 N. Y. 440, a bond and mortgage were intrusted to R. to enable him to get a note discounted by using them as collateral security. R. did not use them for that purpose; and it was held that, inasmuch as R. could not enforce them against the mortgagor, he could give no greater right to an assignee than he had himself. In *Union College vs. Wheeler*, 61 N. Y. 88, the mortgagee received his mortgage knowing that the mortgagor had executed contracts of sale to various persons of portions of the mortgaged property. It was held that the mortgage was a chose in action, that the mortgagee took it subject to the rights and equities of the purchasers under the contracts, and that his assignee of the mortgage occupied simply his position and took subject to the same rights and equities. In *Ingraham vs. Disborough*, 47 N. Y. 421, the decision was precisely the same on a similar state of facts. See also *Clute vs. Robinson*, 2 Johns. (N. Y.) 612.

<sup>2</sup> This doctrine is sustained by *Union College vs. Wheeler*, supra, where it was held that the assignee of the bond and mortgage took subject not only to original equities, but also to the rights and equities of the third persons to whom contracts of sale had been executed. In *Bush vs. Lathrop*, 22 N. Y. 535, the only thing in issue was a latent equity of a third person. Denio, J., cited and discussed all of the New York cases and many others, and repudiated any supposed distinction between latent equities and those existing between the original parties; he referred, with approval, to the declaration of Lord Thurlow in *Davies vs. Austen*, 1 Ves. 247, that “a purchaser of a chose in action must always abide by the case of the person from whom he buys.” But this case is overruled by *Moore vs. Metropolitan Nat. Bank*, 55 N. Y. 41, although in the latter the contest was in respect to a certificate of indebtedness, and it was determined upon the doctrine of estoppel. Probably

It has been held, however, that where a chose in action is assigned as a security of a negotiable note which is itself transferred before maturity for value, it is taken by the assignee free from all equities, on the ground that the security partakes of the nature of the debt.<sup>1</sup> Thus, in *Kenicott vs. Supervisors*,<sup>2</sup> where, on a bill to foreclose a mortgage given to secure negotiable railroad bonds, it appeared that the bonds were transferred to a *bona fide* holder for value, no other or further defences were allowed as against the mortgage than would be allowed were the action brought in a court of law upon the bonds. And in another case in the same court,<sup>3</sup> Swayne, J., says: "Equity puts the principal and accessory on a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. . . . This dependent and incidental relation takes the case out of the rule applied to choses in action, where no such relation of dependence exists."<sup>4</sup> So we shall hereafter see that the doctrine of non-negotiability has been directly applied to certificates of stock, and the transferees or assignees thereof have been made subject to all defences existing between the original parties.<sup>5</sup>

the most powerful advocate of the doctrine that the assignee of a chose in action is only subject to original equities was Kent, C. J. In *Bebee vs. Bank of New York*, 1 Johns. 529, he says (p. 573): "When it is said that an assignee of a chose in action takes it subject to all equity, it is meant only that the original debtor can make the same defence against the assignee that he could against the assignor." He was, however, outvoted by four judges to one, and Tompkins and Spencer, JJ., delivered decidedly contrary opinions. Kent's opinion was followed in *James vs. Morey*, 2 Cow. 246, and the doctrine which it advocates is supported

by *Mott vs. Clark*, 9 Pa. St. 398; *Bloomer vs. Henderson*, 8 Mich. 395. But it has not prevailed in the State of New York.

<sup>1</sup> *Batesville Institute vs. Kauffman*, 18 Wall. 151; *Taylor vs. Page*, 6 Allen, 86; *Croft vs. Bunster*, 9 Wis. 504, 510.

<sup>2</sup> 16 Wall. 452.

<sup>3</sup> *Carpenter vs. Longan*, 16 Wall. 271.

And see *Palmer vs. Yates*, 3 Sandf. 137; *Morgan vs. Smith* Am. Organ Co. 73 Ind. 179; *Cornell vs. Hichens*, 11 Wis. 353; *Fisher vs. Otis*, 3 Chand. 83; *Martineau vs. McCollum*, 4 id. 153.

<sup>5</sup> P. 595.

*(b.) Nature and Different Kinds of Shares of Stock.*

Among the most prominent securities which fall under the head of non-negotiable instruments are certificates of stock ; but, before inquiring how far they are affected by the general doctrine stated above, it will be well to examine briefly the nature of stock. The capital stock of a corporation is that money or property which is put into a fund by those who, by subscription, therefore become members of the corporate body.<sup>1</sup> The terms "capital," "capital stock," and "property" are sometimes used indiscriminately, as in the 4th, 6th, and 10th sections of 1 N. Y. Rev. Stats. 414; and "capital" and "capital stock" are very generally so used as applicable to the estate of a corporation. The phrase "capital stock" is, however, an unfortunate one, because the words "capital" and "stock" are antithetical terms. Strictly speaking, the sums subscribed and paid in, or secured to be paid in, are the *capital* of a corporation ; but stock is the thing or right or interest which the subscriber *pays for* and *receives from* the corporation in return for what he pays in.<sup>2</sup> This property or money is subscribed by persons who are jointly interested in some business or enterprise, and the combination of capital which these contributions form is generally made upon the supposition that by an aggregation of means the business can be more successfully developed or conducted. Besides, by the formation of a corporation, each individual, providing the requirements of the law are complied with, is relieved from personal liability ; and the money or property which he originally invests, unless by his acts he creates an extra obligation against himself, is

<sup>1</sup> Burrall vs. Bushwick R. R. Co. 75 220. As to meaning of terms "cash capital," "paid-up capital," see N. Y. 211.

<sup>2</sup> People vs. Com'rs of Taxes, 23 Wakeman vs. Dalley, 51 N. Y. 27, at N. Y. 192, 223 ; Williams vs. Western Union Telegraph Co. 61 How. Pr. 216, 30, 31.

the extent of his loss in the undertaking—the rule being that the stockholders of a corporation are not liable for its debts or obligations.<sup>1</sup> The capital, when paid in or contributed, becomes in law a trust fund in the hands of the officers who have charge of it, to be administered for the objects of the corporation, and for the benefit of its stockholders and creditors, if there are any of the latter class; but the creditors have the right to the priority of payment over the stockholders.<sup>2</sup> The directors and officers are, in respect to the capital and property of the corporation, under all the disabilities of trustees.<sup>3</sup>

The interest which each person has in the corporation is generally termed a “share,” which is the right to participate in the surplus profits of the corporation in the proportion that the shares held by him bear to the whole number of shares into which the corporate property is divided; and ultimately, on the termination or dissolution of it, to participate in a like proportionate part of the funds remaining after the payment of debts.<sup>4</sup>

<sup>1</sup> Angell & Ameson Corp. §§ 41, 591–595.

<sup>2</sup> Bartlett vs. Drew, 57 N. Y. 587; Tinkham vs. Borst, 31 Barb. 407.

<sup>3</sup> Coleman vs. Second Ave. R. R. Co. 38 N. Y. 201; Butts vs. Wood, 37 id. 317; Barnes vs. Brown, 80 id. 527; Risleley vs. Indianapolis R. R. Co. 62 id. 240; Shropshire Un. R. & C. Co. vs. The Queen, L. R. 7 H. L. 496. A stockholder becomes liable as soon as he affixes his name to the articles of association or subscribes for stock on the books of the corporation (Troy etc. R. R. Co. vs. Tibbits, 18 Barb. 297; Troy etc. R. R. Co. vs. Warren, id. 310), to the extent of the nominal amount of stock so subscribed for, even though he pays in no part of it, and does no act whatever as a stockholder (Spear vs. Crawford, 14 Wend. 20); and is individually liable for the debts of the

corporation to an amount equal to his stock which remains unpaid for, under N. Y. Laws of 1850 and 1854 (Van Cott vs. Van Brunt, 2 Ab. New Cas. 283, rev'd 82 N. Y. 535; Stephens vs. Fox, 83 N. Y. 313). And where a corporation is dissolved, and the stockholders divide its assets, they remain liable for its debts in proportion to the amount of stock held by them (Hastings vs. Drew, 50 How. Pr. 254, aff'd 19 Alb. L. J. 237), to the extent of what they receive on the division (Bartlett vs. Drew, 57 N. Y. 587).

<sup>4</sup> Burrall vs. Bushwick R. R. Co. 75 N. Y. 211; Williams vs. Western Union Tel. Co. 61 How. Pr. 216; 31 La. Ann. 149; People vs. Com'rs of Taxes, 23 N. Y. 199, 220. The stockholder also has the right to share in any surplus of profits

The number and character of the shares depend, in the first instance, entirely upon the agreement of the persons interested, unless these subjects are already regulated by general law or charter. The original parties, subject as above, may make such division of the capital as they deem advisable. The shares may be made few or many, and the representatives of such portion of the capital as is deemed proper.<sup>1</sup> Again, the shares may be arranged in classes, by which one class may be preferred to the other in the right to the profits of the business.<sup>2</sup> So, by consent of the original stockholders, the right to vote may be restricted to one class of shareholders to the exclusion of the other, unless there be something in the charter which prohibits it.

In fine, the original promoters or organizers of a company, unless restrained by their organic law, may divide the corporate property into any number of shares, prescribe such rules for the subsequent administration of the corporate assets and business, and restrict the power of voting or control to such of their number as may be agreed upon in the same manner as partners may do.<sup>3</sup>

But having agreed upon a classification of the shares, the division of profits, or the rights of the shareholders in the future management of the corporation, the arrangement cannot be changed without the consent of the stockholders.<sup>4</sup> The

arising from the use and employment of the capital in the business of the company; and this right does not depend upon the time when he becomes a stockholder, but attaches whenever he acquires the stock and entitles him to all subsequent dividends (*Jones vs. Terre Haute R. R. Co.* 57 N. Y. 196; see also *Hoyt vs. Quicksilver Mining Co.* 17 Hun, 169, 183).

<sup>1</sup> *Somerset R. R. Co. vs. Cushing*, 45 Me. 524.

<sup>2</sup> *Kent vs. Quicksilver Mining Co.* 78 N. Y. 159.

<sup>3</sup> *Kent vs. Quicksilver Mining Co.* 78 N. Y. 159, 178; *Lindley on Part.*

<sup>4</sup> *Kent vs. Quicksilver Mining Co.* id., and cases there cited; *Smith vs. Goldsworthy*, 2 Q. B. 717; 12 L. J. (Q. B.) 192. But see *Ambergate R. R. Co. vs. Mitchell*, 4 Ex. 540; L. J. (Ex.) 89. Or, without such acquiescence on their part as will estop them from subsequently making objections, *Kent vs. Quicksilver Min-*

division of the capital and the rights of each shareholder in the company are sometimes expressed on the face of the certificate, and are always contained in the charter, by-laws, or regulations of the corporation.

The evidence of ownership in corporations is generally attested in this country and in England by a certificate, or some other tangible instrument, issued under the seal of the company.<sup>1</sup> But a person may hold shares in a corporation and be entitled to all the rights of a stockholder, without being possessed of a certificate of stock.<sup>2</sup> In the last-mentioned case, the court said: "We think that cannot prejudice his claim, as it is not in his power to obtain one without the consent of the corporation."<sup>3</sup>

It was indeed held in *Holbrook vs. N. J. Zinc Company*<sup>4</sup> that a stock certificate regularly issued by a corporation within its corporate powers is not only evidence of ownership at the time of its issue, but is also a continuing affirmation of ownership of the specified amount of stock by the person designated therein, or his assignee, until it is withdrawn in some manner recognized by law; so that a purchaser of the stock in good faith has a right to rely upon such certificate, and to claim the benefit of an estoppel in his favor as against the corporation. The issuing of a certificate being a power given to corporations for their own benefit, the face of the certificate is a declaration and representation by the corpora-

ing Co., *supra*. But the directors of a corporation may amend, alter, or cancel a lease under which the stockholders receive a certain stipulated sum per annum, provided they act in good faith. This depends upon the general power of corporations to make and modify its contracts (*Flagg vs. Manhattan R. R. Co. N. Y. Daily Reg.* Dec. 22, 1881. To same effect, *People ex rel. Con-*

*tent vs. Metropolitan El. R. R.* id. Dec. 24, 1881).

<sup>1</sup> *Burrall vs. Bushwick R. R. Co.* 75 N. Y. 211.

<sup>2</sup> *Agricultural Bank vs. Burr*, 24 Me. 256; *Same vs. Wilson*, id. 273; *Chester Glass Co. vs. Dewey*, 16 Mass. 94.

<sup>3</sup> See also *Bank of Commerce's Appeal*, 73 Pa. 64.

<sup>4</sup> 57 N. Y. 616.

tion to all the world that the party to whom it is given is a stockholder in the company, and is the owner of the number of shares stated in the certificate. It is given by the company with the intention that it shall be so used; and a purchaser, taking it in good faith, has a right to rely upon the representation, and to presume that all the pre-requisites to the issuing of it have been complied with.<sup>1</sup>

On the other hand, in a case in England<sup>2</sup> it was held that a stock certificate is not evidence of absolute ownership, but merely a solemn affirmation under corporate seal that a certain amount of stock stands in the name of the person therein designated; and from the very nature and necessities of corporate existence such person may only hold the legal title for a specific purpose, and may not have any equitable interest therein so as to have the right of absolute or general disposal.

But the Supreme Court of the United States, in a leading case upon the subject of stock certificates,<sup>3</sup> said: "No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation in person or by attorney when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer

<sup>1</sup> *Zabriskie vs. C. C. R. R. Co.* 23 N. Y. etc. R. R. Co. vs. Schuyler, 34 How. 381; *Royal British Bank vs. N. Y. 30*, and *Bank vs. Lanier*, 11 Turquand, 6 El. & Bl. 327; *Supervisors vs. Schenck*, 5 Wall. 772. The same binding and conclusive effect is ascribed to certificates of stock in

<sup>2</sup> *Shropshire Un. R. R. & C. Co. vs. The Queen*, L. R. 7 H. L. 496.

<sup>3</sup> *Bank vs. Lanier*, *supra*.

the stock to any one not in possession of the certificates.”<sup>1</sup>

These shares being intangible, and resting in legal abstraction, are not a species of property that can be transferred by delivery; and it has accordingly been said that the assent of the owner to part with them must be expressed in writing.<sup>2</sup> But the cases do not go this far; and it has been held that the mere delivery of the certificate without any assignment is a good gift of stock as a *donatio mortis causa*. Notwithstanding, by the regulations of the company, it is transferable only by the person holding the same, or attorney, in the books of the company.<sup>3</sup>

It is not necessary that a person's ownership in a corporation should be attested by a written muniment of title, for he may prove his interest by parol; and if the corporation issues certificates of stock, he may compel them to issue to him the number to which he is entitled, or sue them for damages for refusing so to do.<sup>4</sup> And if the name of a person appears on the stock-books of the company, it is evidence that he is a stockholder.<sup>5</sup>

Indeed, in the absence of provisions of the law or of the charter to the contrary, strictly speaking it is not necessary in law for a corporation to issue any certificate or muniment of title; the interest of the stockholders may exist and be shown just as the interests of partners. But as a matter of universal custom such certificates are now invariably issued. . . .

<sup>1</sup> A certificate that A is entitled to shares of stock means that they belong to him, not that he has an option to take them or not (*Van Allen vs. Illinois Cent. R. R. Co.* 7 Bosw. 515, *aff'd* 2 Keyes (N. Y.), 673. <sup>2</sup> *Daws vs. Bank of England*, 2 Bing. 393; *Dunn vs. Commercial Bank of Buffalo*, 14 Barb. 580; and see remarks of Folger, J., in *Burrall vs. Bushwick* R. R. Co. 75 N. Y. 211.

<sup>3</sup> *Walsh vs. Sexton*, 55 Barb. 251. See also, upon this subject, *Reed vs. Roberts*, 3 W. N. C. 453; 4 *id.* 355; *Grymes vs. Hone*, 49 N. Y. 17.

<sup>4</sup> *Chester Glass Co. vs. Dewey*, 16 Mass. 94; *Ellis vs. Essex Bridge*, 19 Mass. 243; *Hoagland vs. Bell*, 36 Barb. 57.

<sup>5</sup> *Id.*; *Bank of Commerce's Appeal*, 73 Pa. 59.



Corporations, however, have authority to prescribe rules and regulations for assignees of stock before it will recognize their rights and give them evidence that such rights exist; and these rules and regulations will be alluded to hereafter.<sup>2</sup>

The question then arises as to the legal nature of this interest or share in the corporate property—What are the rights of the owners thereof, or of the holder of a certificate of stock?

The courts have always experienced difficulty in presenting an intelligible definition of stock, and assigning it to its proper place in the classification of property.

In *The King vs. Capper*,<sup>3</sup> Chief Baron Richards ascribed this difficulty to the fact that it was then not an ancient subject of property: "Now, it is certainly not easy to define precisely the meaning of *stock*. It is not an ancient subject of property, nor known to the common-law. It is an annuity, and treated as such by act of Parliament, and is made personal estate by statute."

A more specific, and without doubt a very accurate, definition of government stock was given by the Master of the Rolls in *Wildman vs. Wildman*:<sup>4</sup> "But there is a great difference between a transfer of stock and payment of money. The interest in stock is properly nothing but a right to receive a perpetual annuity; . . . a mere right, therefore. The circumstance that government is the debtor makes no difference—a mere demand of the dividends, as they become due, having no resemblance to a chattel movable or coined money capable of possession and manual apprehension." And this conception of stock does not essentially differ from that of Folger, J., in *Burrall vs. Bushwick R. R. Co.*,<sup>5</sup> where he says that a share of stock is the *right to partake of surplus profits*, etc.;

<sup>1</sup> *Burrall vs. Bushwick R. R. Co.*  
75 N. Y. 211.

<sup>2</sup> P. 616 et seq.

<sup>3</sup> 5 Price, 217, 262.

<sup>4</sup> 9 Ves. 174, 177.

<sup>5</sup> 75 N. Y. 216.

and therefore is such a right as "cannot be issued and delivered by a corporation" so long as it is in legal existence—a right which is intangible and rests in abstract legal contemplation. It is sufficiently obvious, without reference to authority, that *stock* is not a thing in possession, but only a thing in action;<sup>1</sup> and therefore it cannot be ranked with goods and chattels (*bona et catalla*), for chattels embrace only things in possession.<sup>2</sup>

In a legal sense, the individual members of a corporation are not the owners of the corporate property.<sup>3</sup>

In *City of Utica vs. Churchill*,<sup>4</sup> Denio, C. J., referring to the stock of national banks, says: "The shares of these banks are personal property. The stock is a species of chose in action, or an equitable interest which the shareholder possesses, and which he can enforce against the corporation. The shareholder is not the owner of the public stock possessed by the corporation any more than he is the owner of the discounted notes or other securities held by the bank. He is not the owner of either. He is only entitled to participate in the net profits earned by the bank."<sup>5</sup>

Comstock, C. J., in his dissenting opinion in *The People vs. Commissioners of Taxes*,<sup>6</sup> says that stocks, "in some respects, resemble choses in action, and are so treated in the relation of husband and wife, and in other relations. More accurately, I

<sup>1</sup> *The King vs. Capper*, 5 Price, 264.

<sup>2</sup> *Ford and Sheldon's Case*, 12 Coke, 1.

<sup>3</sup> *The Queen vs. Arnaud*, 9 Q. B. 806, 817.

<sup>4</sup> 33 N. Y. 161, 237.

<sup>5</sup> § 5139 U. S. Rev. Stat. (1878) provides, in relation to national banking associations, that "the capital stock of each association shall be divided into shares of \$100 each, and be deemed personal property, and transferable on the books of the associa-

tion in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which rights, remedies, or security of the existing creditors of the association shall be impaired."

<sup>6</sup> 23 N. Y. 192, 220.

think they may be called equitable estates, which entitle the holders to share in the income of the capital which is legally vested in and managed by the corporate body." He then proceeds to notice the fact that corporations themselves never own what is styled their own stock. "They have the power and capacity to create and issue it, but, when created and issued, it always belongs to the individual to whom it is issued, or to his assignee;" and then he distinguishes between the *capital* and the *stock* of a corporation. "The sums subscribed and paid in are the capital of a corporation in the real and actual sense. Stock, on the other hand, is *paid for* and not *paid in*. It is the thing which the subscriber receives in exchange for what he pays in. One of those values—that is, the sum paid—is held by the corporation, and becomes its capital. The other is given to the shareholder, and becomes his stock."

It is believed to be a settled rule that stocks are now generally considered personalty both in England and America, at least in equity.<sup>1</sup> Shares in the Bank of England are made personal estate by statute.<sup>2</sup> And a bequest of public stocks is there regarded as a bequest of personalty, so as to require the assent of the executor to give it effect.<sup>3</sup>

In *Sparling vs. Parker*,\* shares in a gaslight and dock company, which possessed real estate, were held not to be an interest in land within the statute of mortmain; and the same decision was made as to railway canal shares,<sup>5</sup> and as to shares in a joint-stock banking company;° the same was held

<sup>1</sup> *Waltham Bank vs. Waltham*, 51 Mass. 334; though it was formerly otherwise in England, where it grew out of real estate (*Buckeridge vs. Ingram*, 2 Ves. 652).

<sup>2</sup> 1 Geo. I. c. 19, § 2, and 8 and 9 Vict. c. 91, § 1.

<sup>3</sup> *Bank of England vs. Moffatt*, 3 Bro. C. C. 260; *Bank of England vs.*

*Lunn*, 15 Ves. 569; *Franklin vs. Bank of England*, 1 Russ. Ch. 575.

<sup>4</sup> 9 Beav. 450.

<sup>5</sup> *Tomlinson vs. Tomlinson*, 9 Beav. 459; *Walker vs. Milne*, 11 id. 507; *Ashton vs. Langdale*, 4 De G. & S. 402.

<sup>6</sup> *Myers vs. Perigal*, 21 L. J. C. P. 217.

generally of shares in incorporated companies,<sup>1</sup> and that it did not make any difference that the act of incorporation did not contain a clause declaring the shares to be personal estate.

Ware vs. Cumberlege,<sup>2</sup> where shares in Grand Junction Works were held to be interests in land within the Mortmain Act, is a contrary case; and Romilly, M. R., thought that the distinction could not be supported which had been attempted to be drawn between the cases of land held by an association of individuals and an incorporated company—namely, that the fact of the incorporation altered the nature of the interest of the shareholders. He thought the theory a very singular one that the members of a corporation do not hold the land in their individual character, but among them in their corporate character; and complained that under the shadow of a name it was attempted to be made out that what they really possess in their corporate name is something different from what they would possess in their individual character. His view was, that where the substance of an undertaking is a dealing with land, then, whether incorporated or not, the company falls within the provisions of the Mortmain Act.

So in Buckeridge vs. Ingram,<sup>3</sup> the Master was of the opinion that shares in the navigation of the river Avon were so inseparably connected with the real estate as to partake of its character, and therefore to be subject to dower.

The English cases on this subject are not wholly reconcilable; but in the leading case of Bligh vs. Brent,<sup>4</sup> where shares in Chelsea Water-works were held to be personalty, the question is discussed by Alderson in an exceedingly able and practical manner: "What then is the intention of the legislature as to the nature of the interest which each shareholder is to

<sup>1</sup> Edwards vs. Hall, 6 De G. M. & G. 74.

<sup>2</sup> 1 Jur. (n. s.) 745.

<sup>3</sup> 2 Ves. 652.

<sup>4</sup> 2 You. & Coll. Ex. 268, 295.

have? That is, in truth, the whole question in this cause. Now, in the first place, we have a corporation to whose management the joint stock of money subscribed by its individual corporators is intrusted. They have power of vesting it at their pleasure in real estate or personal estate, and of altering, from time to time, the species of property which they may choose to hold. . . . The property is money, the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation, who have an unlimited power of converting part of it into land, part into goods, and of changing and disposing of each from time to time; and the purpose of all this is the obtaining of a clear, surplus profit from the use and disposal of this capital for the individual contributors. It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments—and those varying and temporary instruments—whereby the joint stock of money is made to produce profit.” He followed *Weekly vs. Weekly*,<sup>1</sup> and distinguished the *New River* case, where the individual corporators had the property and the corporation had only the management of it.

In this country, it cannot be doubted that stock is treated as personal property,<sup>2</sup> and it has in some instances been made by statute subject to attachment and execution, thus changing the common-law rule.<sup>3</sup> And on the sale of certificates of stock, the vendor warrants the title, and that they are legally what they purport to be; but he does not warrant their quality or value.<sup>4</sup> Upon the sale of corporate stock both parties believed it to be fully paid up, but in consequence of a reso-

<sup>1</sup> 2 You. & Coll. Ex. 281, note (a).

<sup>2</sup> *Payne vs. Elliot*, 54 Cal. 339.

<sup>3</sup> *Titcomb vs. Union etc. Ins. Co.*, 8 Mass. 326; *Chesapeake etc. R. R. Co. vs. Paine*, 29 Gratt. 502; *Howe vs. Starkweather*, 17 Mass. 243; *Slay-*

*maker vs. Bank*, 10 Pa. St. 373; *Payne vs. Elliot*, 54 Cal. 339; *Denton vs. Livingston*, 9 Johns. 96; *Foster vs. Potter*, 37 Mo. 525.

<sup>4</sup> *Allen vs. Pegram*, 16 Iowa, 163.

lution of the directors the buyer was compelled to make a payment upon it. Held, that, there being neither fraud nor warranty in the sale, he could not recover from the seller.<sup>1</sup>

Nor is a share of stock a debt. A debt is a sum of money due by certain and express contract,<sup>2</sup> and it is obvious that the shares of a corporation do not fall within this definition. The holder of them has no immediate right to enforce any payment against the corporation. The certificates do not contain any promises to pay money; they are not evidences of indebtedness, but are mere acknowledgments that the holder is interested to the extent indicated in the capital of the company, and to such proportion or division of the profits as may have been agreed upon. The owner of the shares cannot take them out of the corporate fund, and the corporation has no power and cannot be compelled, while continuing in legal existence and carrying on the business for which it was created, to issue and deliver such shares—*i. e.* the actual property which the shares represent.<sup>3</sup>

But cases may arise in which a stockholder will be regarded as a creditor of the corporation, and he certainly has, as we shall see,<sup>4</sup> rights which he can enforce through the courts respecting the proper and honest administration of the corporate property.<sup>5</sup> Nor is a certificate of stock money, except by a strained and arbitrary construction. Thus, in *The King vs. Churchwardens*,<sup>6</sup> persons were to be rated on "money out at interest;" and it was held that they should not be rated on government stocks, because these were nothing more than perpetual annuities, the principal of which could never be recalled by the holder.

<sup>1</sup> *Cunningham vs. Spier*, 13 Johns. 392.

<sup>2</sup> P. 592.

<sup>3</sup> *Blackstone's Comm.* (Shars. ed.).

<sup>4</sup> *Burrall vs. Bushwick R. R. Co.* 75, N. Y. 211.

<sup>5</sup> See also *City of Richmond vs. Daniel*, 14 Gratt. 389, where a distinction is drawn between *stocks* and *credits*.

<sup>6</sup> 6 East, 182.

In *Jones vs. Brinly*,<sup>1</sup> the defendant was entitled to a stipulated percentage on moneys received, and it was held that this stipulation did not entitle him to a commission on the transfer of stock; and stock in the public funds cannot be sued for as money;<sup>2</sup> and a bequest of "money and securities for money" was held not to carry Bank of England stock and shares in a canal company.<sup>3</sup> So three-per-cent. consols will not pass under a legacy of £100;<sup>4</sup> nor will a bequest of money remaining pass stock which formed part of the general residue.<sup>5</sup> Whether stock will or will not pass under the word "moneys" or "stock" or "chattels" depends upon the whole context of the will. The word goods also, as well as the word chattels, used simply and without qualification, will sometimes pass the whole personal estate, including stock.<sup>6</sup> A bequest of "all moneys, goods, chattels, clothing, etc.," after payment of funeral charges and debts, passed the testator's stock and money.<sup>7</sup>

From a review of all the cases, it is obvious that the true meaning of the word stock is that attached to it by Folger, J., in *Burrall vs. Bushwick R. R. Co.*<sup>8</sup>

Shares in corporations, then, being choses in action, or rather partaking more closely of that species of property than of any other kind, the certificate which is the evidence of the title to the same, passes by assignment and delivery, and vests the interests and rights of the assignor in his assignee.<sup>9</sup> And, as we

<sup>1</sup> 1 East, 1.

<sup>2</sup> *Nightingale vs. Devisme*, 2 W. Bl. 684.

<sup>3</sup> *Ogle vs. Knipe*, 38 L. J. Ch. 692.

<sup>4</sup> *Gosden vs. Dotterill*, 1 Myl. & K. 56.

<sup>5</sup> *Ommanney vs. Butcher*, 1 Turn. & R. 260; *Hotham vs. Sutton*, 15 Ves. 319.

<sup>6</sup> *Kendall vs. Kendall*, 4 Russ. 360.

<sup>7</sup> *Lynn vs. Kerridge*, 1 West, 172, is to the same effect.

<sup>8</sup> 75 N. Y. 216.

<sup>9</sup> See *Driscoll vs. West, Bradley & C. M. Co.* 59 N. Y. 96; *Mechanics' Bank vs. N. Y. & New Haven R. R. Co.* 13 id. 627; *N. Y. & New Haven R. R. Co. vs. Schuyler*, 17 id. 592; *Slaymaker vs. Bank*, 10 Pa. St. 373; *Wildman vs. Wildman*, 9 Ves. 177; *Howe vs. Starkweather*, 17 Mass. 243; *Hutchins vs. State Bank*, 53 Mass. 521, 426; *Union Bank vs. The State*, 9 Yerg. 500; *Brightwell vs. Mallory*, 10 id. 196;

have seen, a stockholder has not only the right to receive his proportionate share of the profits and ultimate property of the company, but he is entitled to demand, in certain cases, through the courts, that the corporate funds shall be faithfully and honestly applied to the uses and purposes designed by the charter. Thus a stockholder may maintain an action against a corporation to recover his share of a dividend which the directors have declared;<sup>1</sup> and to compel the directors to readjust its dividends so as to make them just and equal, and to correct an error which they have committed in issuing certificates of earnings.<sup>2</sup> And a stockholder may restrain directors from paying a dividend when there are no earnings for such a purpose,<sup>3</sup> and from paying dividends to holders of spurious stock.<sup>4</sup>

Arnold vs. Ruggles, 1 R. I. 165; Allen vs. Pegram, 16 Iowa, 163.

<sup>1</sup> Stoddard vs. Shetucket Foundry Co. 34 Conn. 542; see Scott vs. Eagle Fire Co. 7 Paige, 198.

<sup>2</sup> Luling vs. Atlantic Mut. Ins. Co. 45 Barb. 510.

<sup>3</sup> Carpenter vs. N. Y. & New Haven R. R. Co. 5 Ab. Pr. 277; Carlisle vs. Southeast R. R. Co. 1 Mac. & G. 689.

<sup>4</sup> Underwood vs. N. Y. & New Haven R. R. Co. 17 How. Pr. 537.

The Supreme Court of the United States has just laid down certain limitations upon the rights of Stockholders to begin suits. The court holds that there must exist as the foundation of the suit: 1. Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred by their charter or other source of organization; or (2) such a fraudulent transaction completed or threatened by the existing managers in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation or to

the interests of the other shareholders; or (3) when the board of directors, or a majority of them, are acting for their own interests in a matter distinctive of the corporation itself or of the rights of the other shareholders; or (4) when the majority of shareholders themselves are oppressively or illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

It must be made to appear: (1) That the plaintiff has made an earnest effort to obtain redress at the hands of the directors and stockholders of the corporation; (2) that he was the owner of the stock on which he claims the right to sue at the time of the transactions of which he complains, or that it has since devolved on him by operation of law; (3) that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it would otherwise have no cognizance. U. S. Supreme Ct. MS. Jan. 16, 1882.



There are many kinds of stock, but the two classes which are most generally in vogue are common and preferred. The common stock of a corporation has already been described. It generally includes the right to share in the profits, and to vote and participate in the general management of the company.<sup>1</sup> Preferred stock or preference shares entitle the holder to a priority in the dividends or earnings.<sup>2</sup>

There are also guaranteed shares, by which a corporation guarantees and contracts that all or a part of its earnings shall be at certain times applied to the holders thereof;<sup>3</sup> but such guarantee would not be legal if it stipulated to pay dividends out of its capital.<sup>4</sup>

The forms of these preferred and guaranteed shares are by no means uniform, and no general rule can be laid down which will apply to every case. There are, however, certain propositions in respect to preference shares which may be regarded as settled:

1. That generally a corporation has no power to issue such shares unless the power is given in the charter or by some general law; and that even where the language of a charter is broad enough to authorize the issuance of preference shares in the first instance, if the company is organized upon the basis of a uniform and common stock, preference shares cannot be subsequently created without the consent of the common stockholders.<sup>5</sup>

2. The holders of common stock may, however, be estopped

<sup>1</sup> See, in this connection, Laws N. Y. 1880, ch. 510, regulating the voting by stock and bond holders of railroad corporations of New York.

<sup>2</sup> For form and effect of preference shares, see *Kent vs. Quicksilver Mining Co.* 78 N. Y. 159; *Bailey vs. R. R. Co.*, 17 Wall. 96; s. c. 1 Dill. 174; *St. John vs. Erie Ry. Co.* 22 Wall. 136; s. c. 10 Blatchf. 271; *Thompson vs. Erie Ry. Co.* 45 N. Y. 468.

<sup>3</sup> *Prouty vs. Mich. So. & N. I. R. R. Co.* 1 Hun (N. Y.), 655; *Chase vs. Vanderbilt*, 5 J. & S. (N. S.) 334.

<sup>4</sup> *Lockhart vs. Van Alstyne*, 31 Mich. 76.

<sup>5</sup> *Kent vs. Quicksilver Mining Co.*, 78 N. Y. 159. See also Laws N. Y. 1880, ch. 225, authorizing the change of preferred for common stock of corporations.

from questioning the issuance and validity of preferred stock by acquiescence.<sup>1</sup>

3. The holders of guaranteed and preference stock have the right, upon the happening of the contingency mentioned in their certificates—viz., the making of net earnings—to compel the corporation to perform its contract, and to account for and pay said net earnings or profits.<sup>2</sup> And this right to compel the payment of dividends constitutes the principal distinction between preferred and common stock, for stockholders of the latter class cannot generally, in law or equity, compel the directors or trustees of a corporation to pay dividends; whereas, in the former case, the rule is as we have stated it above.<sup>3</sup> The theory of the law is that the directors of the company are the sole and best judges whether dividends should be paid; and the courts will not interfere with the discretion which has been given to them. If the stockholders are dissatisfied with the management of the corporation, they have the redress in their own hands—viz., to elect other directors.<sup>4</sup>

4. The form of the guaranteed or preferred stock in some cases entitle the holder to cumulative dividends—that is, he has the right to have the arrears of one year made up from the profits of another.<sup>5</sup>

5. Although guaranteed or preferred stock is regarded as establishing a contract between the holder and the company, entitling the latter, when the contingency occurs mentioned in the certificate—viz., the earning of net profits—to enforce payment against the corporation, the arrears due, unlike de-

<sup>1</sup> Kent vs. Quicksilver Mining Co. 8 Mich. 100; State vs. Bank, 6 La. 745; Luling vs. Ins. Co. 43 Barb. 510; supra.

<sup>2</sup> Prouty vs. Mich. So. & N. I. R. R. Co. 1 Hun (N. Y.), 655; Boardman vs. Lake Shore & Mich. So. R. R. Co. 8 N. Y. Week. Dig. 347, aff'd 84 N. Y. 157; Kent vs. Quicksilver Mining Co. supra.

<sup>4</sup> Id.

<sup>5</sup> Boardman vs. Lake Shore & Mich. So. R. R. Co. 8 N. Y. Week. Dig. 347, aff'd 84 N. Y. 157.

clared dividends, pass on the ordinary transfer of the shares; and, after a sale of such stock, the assignor has no right to maintain an action for such arrears against the defaulting company.<sup>1</sup>

6. Notwithstanding the existence of preferred stock, a corporation has the right subsequently to create bonds and mortgages, although the effect of the creation of such incumbrances will be to diminish the profits accruing to the preference stockholders.<sup>2</sup>

The above constitute the general characteristics of preferred and guaranteed shares, but an attentive perusal of the cases upon the subject will show that the courts have not definitely determined two important questions: 1st, the exact relation which a holder of preferred stock bears to the corporation in respect to his right to enforce payment of his dividends, and as to the extent the directors or trustees of the corporation have a discretion in the premises; and, 2d, the meaning of the term "net earnings" or "net profits," as generally used in the preferential certificate.<sup>3</sup>

*(c.) Negotiability as Applied to Stock Certificates.*

We come now to consider the doctrine of negotiability as directly applied to stock certificates; and the importance of this subject to Stock-brokers, banks, and capitalists cannot be overstated, because dealings in these securities constitute the bulk of their business, and hundreds of millions of dollars are employed in their purchase and sale each week in the city of New York alone. Stock certificates, as we have seen, are not,

<sup>1</sup> *Manning vs. Quicksilver Mining Co.* 24 Hun (N. Y.), 360; and see also, *son vs. Erie Ry. Co.* 42 How. Pr. 68; 45 N. Y. 468; *Garrett vs. May*, 19 Md. 177.  
in this connection, *Boardman vs. Lake Shore and Mich. So. R. R. Co.* <sup>3</sup> See, upon this subject, *Union Pacific R. R. Co. vs. United States*, 99 U. S. 402.

<sup>2</sup> *St. John vs. Erie Ry. Co.* 10 Blatchf. 271, 22 Wall. 137; *Thomp-*

technically, negotiable instruments. They are not promises to pay money, and, in a word, lack almost every element necessary to constitute negotiability. They are certificates showing that the individual named therein is entitled to a share in the capital stock of a corporation, to its profits and dividends when they are declared, to a proportionate share of its property upon its being wound up or dissolved. And the courts have everywhere with marked unanimity placed them in the category of non-negotiable instruments.

The effect of non-negotiability we have already considered, and it is very manifest that if that doctrine were to be applied in its full force and rigor to stock certificates, the consequences to the financial world would be most alarming and serious. But we shall see that while the courts, on the one hand, treat them as non-negotiable, on the other hand, through the equitable doctrine of estoppel, stock certificates, with a power to transfer them endorsed in blank thereon, can be dealt in with almost the same immunity as bills, notes, and other negotiable instruments. As a general rule, the company issuing a stock certificate does not recognize a transfer of the same until it has been registered on its books. This is ordinarily performed by an assignment of the stock in writing, made by the former owner of it, with a power of attorney to transfer it on the books of the corporation. Books of transfer are kept for that purpose; and on the production of the above papers the nominated attorney makes the formal transfer, the old certificate is cancelled, and a new certificate is issued to the new owner. And it seems the courts will take notice of this general mode of transfer.<sup>1</sup>

But despite the rules of the companies requiring transfers upon their books, the purpose of which we shall consider

<sup>1</sup> *Burrall vs. Bushwick R. Co.* 75 N. Y. 211; *McNeil vs. The Tenth Nat. Bank*, 46 N. Y. 325, 331.

hereafter, these certificates with an assignment and irrevocable power of attorney executed in blank thereon pass from hand to hand in the same manner as other negotiable instruments. And when they possess a market value they are sold with the same, if not a greater, facility than bills or notes, and the transactions in the former are very much greater in volume and amount than in those of the latter kind. Indeed, it may be affirmed that stock certificates to-day constitute the chief commercial security of the age. And dealings in them are not confined to one market or locality; they are bought and sold in every market in the world, and by universal usage pass from hand to hand.

In view of all of these considerations, it is a grave question whether the time has not arrived for a change in the legal character of these certificates, either by an alteration of the language of the latter so as to bring them within the rule of the law-merchant, or by the courts receiving evidence of the general usages of the commercial community, which usages, as we have seen, have been heretofore successfully invoked to raise non-negotiable securities to the full rank and dignity of negotiable instruments.<sup>1</sup> This last-mentioned means has been attempted, but so far unsuccessfully. In the case of *Aull vs. Colket*,<sup>2</sup> Stock-brokers in the ordinary course of their business received certain certificates from a clerk who had abstracted them from a box belonging to his employers, and they offered to show "that the general custom among banks and Brokers was to transfer title to stocks, especially non-dividend-paying stocks as these were, on certificates and powers signed in blank, and that this class of securities has assumed an important relation to trade and commerce; that thousands of such shares are circulated daily on the Stock Ex-

<sup>1</sup> See ante, p. 484 et seq.

<sup>2</sup> 2 Week. Notes Cas. 322; 33 Leg. Int. 44.

changes of New York and Philadelphia, and pass by mere delivery of certificates and powers; that by the general custom among Brokers and bankers these certificates and powers pass by delivery the same as commercial paper or coupon bonds;" but the usage was rejected.

A somewhat similar case of the rejection of a Stock Exchange usage occurred in *Taylor vs. Great Ind. Penin. R. Co.*,<sup>1</sup> where an owner of £2 and £20 shares desired to sell the former, and for that purpose gave his Broker transfers, which were blank as to name of transferee and as to value and distinctive numbers of the shares. The Broker, in fact, sold the £20 with fraudulent intent. For the purpose of giving validity to the transaction and compelling the owner to stand by the wrongful and unauthorized act of the Broker, it was claimed to be the universal practice of the Stock Exchange to execute such transfers in blank, at least as to the transferee's name. The court assumed the practice to exist, but refused to sanction it, and remarked: "It is clear that these shares were not transferred by him [the owner], for the law is settled upon this subject, and the safety of property depended upon it. This case is, indeed, a remarkable instance of the value of the existing rule of law upon the subject. To permit the practice of Stock-brokers and Stock-jobbers to prevail against such a rule was entirely out of the question. Brokers must, like all other persons, be bound by the law and must observe its rules."

A similar usage was also condemned in *Denny vs. Lyon*,<sup>2</sup> where it was proved that the name of the transferee of stock was usually not inserted in the power of attorney, and that it was more convenient not to have it inserted, and the court remarked: "We know that this is the commercial usage. It was probably originated by the banks. If not, they have

<sup>1</sup> 5 Jur. (n. s.) 1087.

<sup>2</sup> 38 Pa. St. 98.

countenanced it and thus brought people to practise it. And yet it is a vicious usage, which no considerations of convenience are sufficient to justify. *Malus usus abolendus est.* A power of attorney signed, sealed, and delivered, what is it but a finished legal instrument? Who may alter it to the prejudice of another without incurring liability to the charge of forgery? If commercial usage permit the attorney to insert the names of P. & W. and then erase them, then insert the name of W. N. and next erase it, and then insert his own name as agent, what other legal instrument may not commercial usage tamper with in like manner?" The usage was not sanctioned, and the authority of the attorney was held to be exhausted by the insertion of the single name originally contemplated by the owner of the stock.

But, notwithstanding the refusal of the courts to receive such evidence and to invest these certificates with the attributes of negotiability, the modern decisions have, as we have said, practically placed them upon an equality with bills, notes, and other negotiable instruments; and we shall find that a *bona fide* purchaser for value of such certificates, with powers of sale endorsed in blank thereon, can, with two or three exceptions, to which we shall refer, hold them even against the true and rightful owner; and this proposition forms the principal exception to the rule that the assignee of a negotiable chose in action takes it subject to existing equities.<sup>1</sup>

<sup>1</sup> The principal English authorities for this proposition are as follows: *Ex parte Swan*, 7 C. B. (n. s.) 400; *Swan vs. North British Australasian Co.* 7 H. & N. 603; same *vs.* same, 2 H. & C. 175; *Taylor vs. Great Indian Peninsula Ry. Co.* 5 Jur. (n. s.) 1087; 1 Story Eq. 375, § 390; *Pearson vs. Scott*, L. R. 9 Ch. Div. 198; 38 L. T. (n. s.) 747; 26 W. R. 796; *Rumball vs. Metropolitan Bank*, L. R. 2 Q. B. Div. 194; 46 L. J. Q. B. Div. 346; 36 L. T. (n. s.) 240; 25 W. R. 366; *Goodwin vs. Roberts*, 45 L. J. Ex. Div. 748; L. R. 1 App. Cas. 476; 35 L. T. (n. s.) 179 H. L. The principal American authorities are as follows: *Bank vs. Lanier*, 11 Wall. 369; *Budd vs. Monroe*, 18 Hun. 316; *McNeil vs. Tenth Nat. Bank*, 46 N. Y. 325; *Commercial Bank vs. Kortright*, 22 Wend. 348; *Moore vs. Metropolitan Nat. Bank*, 55 N. Y. 41; N. Y. & New Haven R. R. Co. *vs.*

The general rule applicable to property other than negotiable instruments undoubtedly is, that the vendor or pledgor can convey no greater right or title than he has. *Nemo dat quod non habet*. But this maxim is applicable to a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing as against them the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.<sup>1</sup>

It may therefore be stated as a well-settled proposition that where the owner of a certificate of stock with a power of attorney in blank endorsed thereon, attached thereto, or connected therewith, intrusts it to an agent, servant, or other person, so that by the recognized usages of business it will pass from hand to hand, or the owner is guilty of negligence in respect thereto,<sup>2</sup> a *bona fide* purchaser or holder without notice

Schuyler, 34 N. Y. 30; Weaver vs. Mining Co: 7 Rep. 332; Tome vs. Barden, 49 N. Y. 286; Leitch vs. Wells, 48 N. Y. 585; Zulick vs. Markham, 6 Daly, 129; Dickinson vs. Dudley, 17 Hun, 569; Matthews vs. Mass. Nat. Bank, 10 Alb. L. J. 199; Wood's Appeal, 8 Week. Notes Cas. 441; 92 Pa. St. 379; Burton's Appeal, id. 505; s. c. 93 Pa. St. 214; Ellis's Appeal, id. 538; Aull vs. Colket, 2 Week. Notes Cas. 332; 33 Leg. Int. 44; Moody vs. Bank, 3 Week. Notes Cas. 118; Thompson vs. Toland, 48 Cal. 99; Winter vs. Parkersburgh R. R. Co. 39 Md. 36, 17 Am. Rep. 540; Mount Holly Turnpike Co. vs. Terrel, 17 N. J. Eq. 117; Prall vs. Tilt, 28 N. J. Eq. 479; Bridgeport Bank vs. R. R. Co. 30 Conn. 231; Atkinson vs. Atkinson, 90 Mass. 15; Garvin vs. Wiswall, 83 Ill. 215.

<sup>1</sup> Per Rapallo, J., McNeil vs. Tenth Nat. Bank, 46 N. Y. 325.

<sup>2</sup> Aull vs. Colkett, 2 Week. Notes Cas. 322; 33 Leg. Int. 44.



will be protected in his possession, although the agent or person to whom the certificate has been intrusted has diverted it from the purposes for which it was committed to him, or has been guilty of fraud or a breach of trust in relation thereto.<sup>1</sup>

The rights of a *bona fide* holder as against the true owner of the stock, to whom the apparent holder has either sold or pledged it, do not depend on the negotiable character of the certificates, but rest on a different principle—viz., that one who has conferred upon another, by a written transfer, all the *indicia* of ownership of property, is estopped to assert title to it as against a third person who has in good faith purchased it for value from the apparent owner. And this is a most just and reasonable rule, for when an owner of one of these certificates executes a blank assignment, with a power of attorney to transfer the stock on the books of a corporation, such as is ordinarily used, without any notice on the face of the same that it is intended to be restricted to a particular purpose, he commits a commercial act. If he then intrust it to a faithless agent, or if, by his own negligence, the certifi-

<sup>1</sup> See authorities cited ante, p. 599. (Moore vs. Metropolitan Nat. Bank, 55 N. Y. 41): "One reason why an owner of corporate shares or of goods and chattels who has conferred upon another the apparent ownership, without transferring to him a valid title, was held precluded from asserting his title against a *bona fide* purchaser from such apparent owner is that such purchase was made upon the faith of the title which he had apparently given, and that it would be contrary to justice and good conscience to permit him to assert his real title against an innocent purchaser from one clothed by him with all the *indicia* of ownership and power of disposition." But where a Broker received, in the course of trade, a transfer in blank of stock which had in fact been stolen and sold, in a mining company organized under the laws of California, held, that he was liable to the true owner for its value and damages (Bereich vs. Marye, 9 Nev. 312). On the same principle, where a trustee is clothed with full power to manage and control the trust estate, an assignment by him of a mortgage impressed with the trust to a *bona fide* purchaser cannot be impeached by the cestui que trust (Dillaye vs. Commercial Bank, 51 N. Y. 345); and Grover, J., states the reason of the exception in the following words

cate gets into circulation and into the hands of an innocent party, the owner should suffer.

The whole question then resolves itself into one of *notice*. Had the purchaser or holder of the stock certificate notice of the rights of the true owner? Had he knowledge of the purpose for which the owner placed it in the hands of his agent? If he had no notice, the law protects him; if otherwise, it will not protect him.

We shall now proceed to consider what notice is sufficient to prevent the true owner from being deprived of his title; and the cases upon this subject resolve themselves into three classes: 1st, those in which the notice appears on the face of the certificate; 2d, where it is *dehors* the certificate, and is gathered from the circumstances surrounding the transaction; and, 3d, those cases in which the *bona fide* purchaser or holder acquires the right to hold the certificate by reason of the negligence or carelessness of the owner.

1. *Cases in which notice appears on the face of the certificate.*

It is a familiar and well-established rule, both in England and the United States, that persons who deal with or receive written instruments are chargeable with constructive notice of their contents and of their legal effect, and are bound thereby, whether they examine them or not.<sup>1</sup>

In *Baring vs. Corrie*,<sup>2</sup> the defendants bought goods from one whom they knew to be both a merchant and Broker, but at the time of the sale they received from him a sold note, exactly in proper form, supposing him to have sold in his character of Broker. It was held that this was sufficient notice to put them upon inquiry for the principal, and, having failed to make such inquiry, they were not permitted, in settlement for the goods, to offset a claim which they had against

<sup>1</sup> *Farmers' etc. Nat. Bank vs. Logan*, 74 N. Y. 568, 580; *City Bank vs. Ex.* 543.  
*Rome, Watertown etc. R. Co.* 44 id.      <sup>2</sup> 2 B. & Ald. 137.

the Broker, but were obliged to pay the principal in full. In this case the owner had not intrusted the Broker with possession of the goods, and thereby enabled him to appear as owner, and therefore it was distinguished from the early English case of *Hern vs. Nichols*,<sup>1</sup> where the owner was held answerable for the deceit of his factor, and Holt, C. J., said that, "seeing somebody must be a loser by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."<sup>2</sup>

In *Pannell vs. Hurley*,<sup>3</sup> one P. conveyed in trust to C. B. & D., who opened a trust account with bankers, headed in their books "H. P.'s Estate." The bankers dissolved, and defendant continued the business, receiving the old books and carrying on the trust account. D., one of the trustees, drew out of the trust account and paid a deficit in his private account. Held, that defendant was chargeable with notice by the heading of the trust account, *inter alia*, and must settle with the Pannell estate, independently of any set-off he had against the trustee D.

*Taylor vs. Great Ind. Penin. R. Co.*<sup>4</sup> was a case of conflicting equities, where either the owner of stock or its purchaser must suffer loss through the fraud of a Broker employed by the former; and the purchaser contended that the owner ought to bear it because he had been negligent in executing the transfer of the stock in blank, and thereby made it possible for the Broker to effect the fraud; but it was held that inasmuch as the transfers, at the time they were delivered to the purchaser, were still in blank as to the value and distinctive numbers of the shares, and the name of the transferees, they carried on their face constructive notice of their own invalidity to all concerned. The court, however, in this case,

<sup>1</sup> 1 Salk. 289.

turned on the same point as *Hern vs. Nichols*.

<sup>3</sup> 2 Coll. 241.

<sup>2</sup> *George vs. Clagett*, 7 T. R. 359, and *Rabone vs. Williams*, id. 360,

<sup>4</sup> 5 Jur. (n. s.) 1087.

did reflect upon the plaintiff for the imprudent manner in which he had executed the transfers, and therefore allowed him no costs. This case would seem to teach that where equities are to be balanced between an owner and a purchaser of stock, both of whom have been negligent, and one of whom must suffer loss through the fraud of another, the scale will turn in favor of him who has been least negligent.

The registered proprietors of stock have the legal title to it; and therefore an instrument of transfer by them, or any other writing which suggests who are the registered proprietors, is sufficient to put a purchaser upon the inquiry whether they are not also the absolute and equitable owners. Accordingly,<sup>1</sup> a purchaser is not justified in dealing with the solicitor of executors as a principal, because he received notice from the form and terms of the transfer which was signed by the executors, and from the accompanying letter, that they, and not the solicitor, had the legal title.

In *Shropshire Union R. & C. Co. vs. The Queen*,<sup>2</sup> certificates of railway stock were intrusted to one of the directors, who was also the banker of the company, and he also stood on the register of the company as the owner of the said stock. He borrowed money from R., and deposited the certificates with him as security, but R. died without having applied to be registered as owner. His widow and executrix made such application, and was refused, on the ground that if R. had made proper inquiries he would have found that his transferor was only a trustee; that negligence sufficient to affect their equitable title could not be imputed to the other directors and the company in thus allowing the apparent title to rest in the one director; and that consequently the equitable title of R. could not prevail against the earlier equitable title

<sup>1</sup> *Pearson vs. Scott*, L. R. 9 Ch. D. 198.      <sup>2</sup> L. R. 7 H. L. Cas. 496.

of the company. And Lord Cairns, it seems, was of the opinion that any one dealing in stock or corporate property was always bound to make inquiry as to the actual ownership and condition of the title; for he says,<sup>1</sup> "He ought to have known that although H.'s name appeared upon the register as the owner of these shares, and although H. could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of H. himself, or that they were the property of some other person." In brief, that the only way he could perfect his title was to go to the company and have a transfer of those shares from H.'s name to his own in the register. But it is questionable whether the conclusion reached in this case is not in conflict with the best authorities both in England and in the United States.

So where the incomplete and non-negotiable bonds of a railroad corporation were conditioned for the payment of either of two specified kinds and amounts of national currency, to be determined by the place to be fixed for their payment, and contained a clause authorizing the president of the corporation to fix, by his endorsement, such place of payment, and the bonds were endorsed in blank by the president, without fixing the place of payment, the *bona fide* purchaser of such bonds was held chargeable with notice of their defects, and could neither acquire nor convey a title to the bonds.<sup>2</sup>

A certificate of stock containing the words "in trust," or other equivalent words, is constructive notice of a trust to all who deal with the certificate, and puts them upon inquiry as to the authority of the trustee to dispose of the stock.<sup>3</sup> If such a certificate is pledged by the trustee to secure his own debt,

<sup>1</sup> P. 505.

Sprague vs. Cochecho Mfg. Co. 10

<sup>2</sup> Ledwich vs. McKim, 53 N. Y. 308. Blatchf. 173; Gaston vs. Amer. etc.

<sup>3</sup> Budd vs. Munroe, 18 Hun, 316; Bank, 29 N. J. 98.

the pledgee is by the terms of the certificate put upon inquiry as to the character and limitations of the trust.<sup>1</sup>

The old rule seems to have been that ordinarily it was a breach of trust for a trustee of stock to transfer it, of which a purchaser was chargeable with notice; and therefore the *cestui que* trust was entitled to have the individual stock restored to him.<sup>2</sup>

Brewster vs. Sime<sup>3</sup> seems to be contrary to the general current of authority, for it holds that the addition of the word "trustee" after the name of a person to whom stock is transferred is not sufficient to put persons dealing with the trustee upon inquiry as to the trustee's title or as to the owner's equitable right. Crockett, J., in his opinion, assigns as a reason for his position that "considerations of public policy and common justice demand that when stock is placed in the name of a trustee under these circumstances, the secret owner shall be bound by the act of his trustee dealing with persons who have no actual notice of the relations between the parties."<sup>4</sup> And although, as we have said, this position is exceptional to the general run of the cases, many strong reasons may be urged in support of it.

But an executor is not under the same disability as a trustee, and a purchase of stock from him is ordinarily valid, though affected with some peculiar trust or equity, because the purchaser cannot be presumed to know that the sale is not required in order to discharge the testator's debts,<sup>5</sup> it being the executor's primary duty to dispose of assets and settle

<sup>1</sup> Shaw vs. Spencer, 100 Mass. 382; Duncan vs. Jaudon, 15 Wall. 165; 121.

Swan vs. Produce Bank, 24 Hun, 277; Atkinson vs. Atkinson, 90 Mass. 15, where same rule is applied to a guardian. Compare Ashton vs. Atlantic Bank, 85 Mass. 217; 2 Perry

on Trusts, § 814, 815, and cases cited.

<sup>2</sup> Harrison vs. Harrison, 2 Atk.

<sup>3</sup> 42 Cal. 139.

<sup>4</sup> To same effect, Thompson vs. Toland, 48 Cal. 99.

<sup>5</sup> Hutchins vs. State Bank, 53 Mass. 421.

the estate,<sup>1</sup> which differs in this respect from the duty of a trustee, which is that of custody, and not of administration or sale;<sup>2</sup> but if the purchaser from an executor has a reasonable ground for believing that he intends to misapply the proceeds, he will not be protected.<sup>3</sup>

In Pennsylvania, the highest court of the State in two cases, almost simultaneously reported, has fully secured the rights of a *bona fide* holder or purchaser of stock certificates.

In Wood's Appeal,<sup>4</sup> G. R. W., one of several executors, abstracted from a fire-proof safe certificates of stock belonging to the estate without the knowledge of his co-executors. These certificates stood in the name of C. S. W., the testator, and were accompanied by a blank bill of sale and power of attorney to sell and transfer, signed "G. R. W., acting executor." G. R. W. was engaged in stock speculations, and delivered these certificates, with the power, etc., to his Broker, who in turn pledged them with another Broker, the defendant, to secure certain transactions between them. In an action by the co-executors of G. R. W. against the defendant, it was decided that they could not recover from the defendant, he having purchased in good faith, and that there was nothing to put him upon an inquiry. The court held that, if the action had been against the first Broker, the plaintiffs could have recovered, "for they [the Brokers] participated in the wrongful act of G. R. W.; the transaction itself gave them notice of the misapplication; that the fact of the power of attorney being signed by an executor made the case no different than if it had been signed by the testator himself, an executor having an absolute power of disposal over personal effects, and the

<sup>1</sup> Leitch vs. Wells, 48 N. Y. 585; <sup>3</sup> Lowry vs. Commercial etc. Bank, Wood's Appeal, 92 Pa. St. 379; Prall Taney's Dec. 310.

vs. Tilt, 28 N. J. Eq. 479.

<sup>2</sup> Bayard vs. Farmers' etc. Bank, <sup>4</sup> Wood vs. Smith (s. c.), 92 Pa. St. 52 Pa. St. 232; Jaudon vs. Nat. City Bank, 8 Blatchf. 430.

379; Burton's Appeal, 93 id. 214.

*bona fide* alienee being perfectly protected by such sale." The court distinguished the case from one had directly with trustees, where there is no presumption of a right to sell it,<sup>1</sup> or from a case where it appeared that the party dealing with an executor had notice of the transaction.<sup>2</sup>

And if a corporation issue stock to a trustee, knowing the name of the beneficiary, it is chargeable with notice of the terms and limitations of the trust, and cannot, by any participation with the trustee in a violation of the trust, defeat the rights of the beneficiary.<sup>3</sup>

The effect of notice to a purchaser, which is intrinsic to the muniment of title, is well exemplified in *Atkinson vs. Atkinson*.<sup>4</sup> In this case, the corporation issued a certificate to a guardian for ten shares of stock in his capacity as such, and also two other shares to the same guardian without qualifying him as such. His assignment of the ten shares was set aside because of the notice to the transferee contained in the certificate, while the transferee of the two shares was protected because he had no notice or knowledge of the violation of the trust.

## 2. *Notice dehors the documents of title.*

If one who buys stock of an executor has notice that it belongs to the testator's estate, and actual knowledge that there are other executors who do not join, he is thereby put upon inquiry as to the propriety of the sale; and, if he omits such inquiry, will be decreed to return the stock to the estate discharged from the lien of his advances.<sup>5</sup>

If a person buys stock from one whom he knows to be acting in an official capacity, he is chargeable with notice of the legal duty imposed by law upon such official—*e. g.*, he is

<sup>1</sup> *Duncan vs. Jaudon*, 15 Wall. 165; *Shaw vs. Spencer*, 100 Mass. 382.

<sup>2</sup> *Prall vs. Hamil*, 28 N. J. Eq. 66.

<sup>3</sup> *Loring vs. Salisbury Mills*, 125 Mass. 138.

<sup>4</sup> 90 Mass. 15.  
<sup>5</sup> *Ellis's Appeal*, 8 Week. Notes Cas. 538.



bound to know that an administrator is required by law to sell at public sale.<sup>1</sup>

A purchaser of stock is not chargeable with notice of a by-law, however, which the corporation has no authority to make either by its act of incorporation or by general law; and is not put upon inquiry for a lien declared by such law arising out of the indebtedness of the seller of the stock to the corporation.<sup>2</sup> But he is chargeable with notice of original articles of association, which have been adopted into the charter of the corporation, providing that a shareholder should not transfer his stock as long as he was indebted to the corporation.<sup>3</sup> Where the owner of stock delivers the certificate to his pledgee with a power to transfer it, the fact that his name is in the certificate is not notice of his rights as against third persons, who take it for value from the pledgee.<sup>4</sup>

In *Crocker vs. Crocker*,<sup>5</sup> the firm of L. & Co. advanced moneys to one of the partners, Stephen Crocker, and took as security certain shares of stock which they knew he held in trust for his brother, and not in his own right; therefore, as against the *cestui que* trust, they took nothing by the fraudulent transfer.

In *Jandon vs. National City Bank*,<sup>6</sup> the transaction of loan indicated that the transferee of stock was not selling the same in the ordinary course of his business as trustee, but that he was borrowing money for his private use on a pledge of trust property; and therefore they were obliged to disgorge.

The latest authority in New York upon the question of notice when it arises dehors the certificate of stock is the case

<sup>1</sup> *Nutting vs. Thomason*, 46 Ga. 34.

<sup>2</sup> *Driscoll vs. West Bradley etc. Mfg. Co.* 59 N. Y. 96.

<sup>3</sup> *Leggett vs. Bank of Sing Sing*, 24 N. Y. 233; *McDowell vs. Bank of Wilmington, etc.* 2 Del. 1; *Union Bank vs. Laird*, 2 Wheat. 390. And

of by-laws passed in accordance with act of incorporation, *Cummings vs. Webster*, 43 Me. 192; *Barrett vs. Union Mutual Ins. Co.* 61 Mass. 181.

<sup>4</sup> *Felt vs. Heye*, 23 How. Pr. 359.

<sup>5</sup> 31 N. Y. 507.

<sup>6</sup> 8 Blatchf. 430.

of Merchants' Bank vs. Livingston.<sup>1</sup> In that case, defendant L. delivered to defendant B. a certificate of stock as collateral for a loan of \$3000. B. applied to W., plaintiff's agent, for a loan thereon of \$8000, stating that he wanted it for a Client. W. agreed to make the loan if B. would procure a proper power of attorney to be attached to the certificate. B., by representing that he ought to have the instrument to secure his loan, procured from L. a transfer and irrevocable power of attorney to make a transfer executed in blank. B. filled up the blanks save the name of transferee and attorney, and delivered it with the certificate to W., who thereupon made the loan. B. had no authority from L. to borrow or to pledge the stock. In an action to foreclose plaintiff's alleged lien upon the stock—held, that as B. did not claim to be the owner of the stock, but only to be acting as agent for the owner, and as he had, in fact, no authority or apparent authority so to act, L. was not estopped from asserting his title to the stock, and plaintiff could not assert a lien save at most for the amount for which the stock was pledged to B.; that while the transfer and power of attorney gave to B. an apparent ownership in case he had claimed title or an apparent authority to sell as agent, it did not hold him out as authorized to make a loan or to pledge the stock, or, at most, it only indicated that he could pledge the stock for an authorized loan. The court said: "If he [B.] had been authorized by L. to borrow the money, he could probably have pledged the stock in his possession to secure it. And he could have taken the certificate and power of attorney and gone into the market claiming to act as the agent of the plaintiff, and have sold the stock and given a good title. The possession of the certificate and full power of attorney would have given him the apparent authority to sell."<sup>2</sup>

<sup>1</sup> 74 N. Y. 223.

<sup>2</sup> See also Porter vs. Parks, 49 N. Y.

3. *Cases in which the bona fide purchaser or holder acquires the right to hold the certificate by reason of the negligence or carelessness of the owner.*

The owner of stock certificates may also lose his title to the same by his own negligence or carelessness in respect thereto, the rule of law being that, where one of two innocent persons must suffer by the fraud or negligence of a third, whichever has accredited him must bear the loss.<sup>1</sup> And a question as to whether it was negligence in the plaintiffs to leave their certificates with their clerk or book-keeper, so that the latter could fill in the blanks and transfer them to innocent purchasers, is one for the jury.<sup>2</sup> A few of the leading cases will fully illustrate the rule upon this subject.

In *Davis vs. Bank of England*,<sup>3</sup> Best, C. J., says: "It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfers to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate." These views are well illustrated by the history of the Bank of England stock. There was a time when the Bank, in dealing with executors or trustees under a will, had to take cognizance of the will and of the limitations of the trust therein contained; but this became so onerous when al-

564, which is a case of actual notice. *dorff vs. Wickersham*, 63 Pa. St. 87.

<sup>1</sup> *Aull vs. Colket*, 33 Leg. Int. 44;

<sup>2</sup> *Aull vs. Colket*, supra.

<sup>3</sup> 2 Week. Notes Cas. (Pa.) 322; *Mun-*

<sup>3</sup> 2 Bing. 393, 405.

most every man in the kingdom became the owner of its stock that a relaxation of the rule became a necessity. As was remarked by the Lord Chancellor, in *Hartga vs. Bank of England*,<sup>1</sup> "All the former strictness of practice in the Bank could not have prevented the stock from being put into the name of Stonehouse [executor]; when once put into his name, to which he was distinctly entitled, could the Bank look farther and inquire whether the stock standing in his name was trust stock? If so, the Bank would be charged with all the trusts in the kingdom. It was enacted by 1 Geo. I. c. 19 that such portion of a will as related to the disposition of stock should be registered in the office of the chief accountant of the Bank of England; and in default thereof the Bank need take no notice of it, but might allow the executor full control as to the transfer and disposition of the stock. 8 and 9 Vict. c. 97 modified the above act, so that the only precaution the Bank had to take in dealing with executors was to require the probate of the will to be left at the Bank."

The leading case in England is *Goodwin vs. Roberts*.<sup>2</sup> There G. purchased, through his Broker, some Russian and Hungarian scrip; the undertaking in the scrip was to give to the bearer a bond for the money advanced, payable, with interest, in the way there stated. G. left the scrip (to be exchanged for bonds or sold, as he should direct) in the hands of his Broker, who fraudulently deposited it with a banker as security for a loan to himself. Held, that the scrip was a negotiable instrument, transferable by mere delivery, and that the banker, being a *bona fide* holder for value, was not liable to G., either in trover for the scrip itself, or in assumpsit for value received upon it. The Lord Chancellor (Cairns) also sustained the judgment upon the rule of estoppel; that, having placed the scrip with the Broker, and as it contained

<sup>1</sup> 3 Ves. 55.

<sup>2</sup> L. R. 1 App. Cas. 476.

nothing on its face limiting him in disposing of it, it would pass with a good title to any one taking it in good faith and for value; and that the owner, having put it into the power of his agent to hand over the scrip with this representation, could not complain if the agent disposed of the same contrary to his secret instructions. The doctrine above laid down may now be regarded as definitely and permanently incorporated into the commercial jurisprudence of England and the United States. It was followed by *Rumball vs. Metropolitan Bank*.<sup>1</sup>

The leading case upon this subject in New York is *McNeil vs. The Tenth National Bank*.<sup>2</sup> In that case plaintiff was the owner of certain bank stock, the certificate of which he delivered to and left with his Stock-brokers to secure any balance of account. Upon the certificate was endorsed a blank assignment, and power of attorney to transfer, signed by the plaintiff, purporting on its face to have been executed "for value received." Plaintiff's indebtedness on the account was \$3000 and interest. The Brokers, without authority and without plaintiff's knowledge, pledged the scrip, with other securities, to secure an advance of a larger sum of money. Defendant, at their request, paid the last-named advance and received the securities. The other securities were sold, leaving a portion of the amount advanced by defendant unpaid. The court, after a very thorough discussion of the cases, held that defendant was entitled to hold the stock for the full amount remaining.<sup>3</sup> So where plaintiff delivered to his Broker a certificate of stock, with a blank power of attorney to transfer it endorsed thereon, and directed his Broker to procure a loan of

<sup>1</sup> L. R. 2 Q. B. Div. 194.

<sup>2</sup> 46 N. Y. 325.

<sup>3</sup> See also *Moore vs. Metropolitan*

*Bank*, 55 N. Y. 41; *Leitch vs. Wells*, 48 id. 585.

money for him thereon, the Broker, instead of so doing, through the aid and assistance of defendants (who were also Brokers, and who acted in good faith and without knowledge of who was the owner of the stock, or what the plaintiff's instructions to his Broker had been), sold it to a purchaser in good faith. Held, that the defendants were not liable for a conversion of the stock, and stood, being equally innocent, in the same position as the purchaser from them in good faith.<sup>1</sup>

In *Burton's Appeal*,<sup>2</sup> B. left with one P., a Stock-broker in the city of Philadelphia, certificates of stock for 100 shares of railroad stock, with instructions to sell if the stock reached 64½; at the same time, he signed and left with P. a blank power of attorney to transfer, and a bill of sale of the stock in the usual Broker's form. The stock never reached 64½, and several times during the year B. asked for the return of the certificates, but P. always made some excuse and did not return them. In fact, two days after their receipt, P. had pledged the stock to a life-insurance company for an advance made to him individually, and the stock remained with the company until P.'s death. The question involved was whether B. could recover from the life-insurance company the certificates, or the price thereof. The question was an original one in Pennsylvania, and the court held "that when the owner of stock, in the ordinary course of business, and in the method common to all mercantile communities, by his own act has armed another, his agent or attorney, with power to act for him, and when this agent or attorney deals with innocent third parties, who, without notice or other intervening equity, advance money upon the faith of the evidences of title in the possession of the attorney or agent, the owner takes every risk, and is bound by the act of the person whom he sees fit

<sup>1</sup> *Zulick vs. Markham*, 6 Daly, 129; See *Garvin vs. Wiswall*, 83 Ill. Dickinson vs. Dudley, 17 Hun, 569. 215.

<sup>2</sup> 93 Pa. St. 214.

to hold out to the world as his attorney or agent." The court distinguished the case from one where the owner, by accident or misfortune, parted or lost his certificate;<sup>1</sup> or where a name had been erased from a certificate and another one inserted.<sup>2</sup>

But negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number, and allowing him to receive the income; and no authority to deal with the property (railway debentures) can be implied even in favor of a *bona fide* purchaser from such trustee.<sup>3</sup> And the mere intrusting, by the owner of stock, of his certificates to bankers for safe-keeping is not of itself such negligence as will prevent a reclamation even after the stock has passed into the hands of a *bona fide* purchaser by means of a forgery; because the mere possession of the certificates is not complete evidence of ownership. It is, however, such negligence as disentitles the owner who reclaims to costs.<sup>4</sup> So in *Bank vs. Evans*,<sup>5</sup> trustees of an incorporated charity possessed stock in the public funds registered in the Bank of Ireland. The secretary of the incorporated trustees was allowed to have the seal in his possession. Five powers of attorney, sealed with the seal of the incorporated trustees, the due affixing of which seal was attested by witnesses, were presented to the bank, and the stock was transferred. By a power of attorney duly executed, the trustees then authorized C. to transfer the stock, but the bank refused to make the transfer. An action was brought by the trustees on this refusal; the judge who tried the case told the jury that if, under these circumstances, the trustees had so negligently conducted themselves as to contribute to the loss, the verdict must be given

<sup>1</sup> *Biddle vs. Bayard*, 13 Pa. St. 152. Co. 1 John. & H. 243. See *Shropshire Union R. R. & C. Co. vs. The Queen*, L. R. 7 H. L. 496, before cited.

<sup>2</sup> *Denny vs. Lyon*, 38 Pa. St. 98. See also *Pa. R. R. Co.'s Appeal*, 5 Week. Notes Cas. 22; 86 Pa. St. 80. <sup>4</sup> *Johuston vs. Renton*, L. R. 9 Eq. 181; same vs. *Parsey*, id.

<sup>3</sup> *Cottam vs. Eastern Counties R.* <sup>5</sup> 5 H. L. Cas. 390.

for the bank. On exception for this direction, held, that it was wrong.

How far the owner of stock may be estopped by his own acts from asserting his title, even as against one not having the equities of an innocent purchaser for value, is well illustrated in *Calhoun vs. Richardson*,<sup>1</sup> where the president of a company having made his affidavit that certain bonds belonging to defendant were assets of the company, the defendant signed a certificate as to the truth of the affidavit, but pretended he did not know the contents of the same, and it was held that it was a question for the jury whether the defendant was not guilty of such gross negligence as estopped him from asserting title to the bonds as against a trustee appointed to wind up the affairs of the insolvent company.

### *III. Transfer of Stock.*

#### *(a.) Method of Transfer.*

There does not seem to be a solitary case in the books where the general right to sell and transfer certificates of stock has been denied. Indeed, the celerity with which this species of property can be sold and transferred offers one of the principal inducements for capitalists to deal in it. Accordingly, most, if not all, commercial corporations or companies invite and encourage the assignments of their shares, and provide on the face of their certificates, by virtue of their charters, by-laws, or regulations, the methods by which such transfer may be effected, in language substantially as follows: *transferable on the books of the company, in person or by attorney, on surrender of certificate.*

And it has been asserted by some judges that it is the duty of business corporations to prescribe the rules and formalities

<sup>1</sup> 30 Conn. 210.



to be observed by assignees of stock which will act as safeguards to its stockholders and to the public.<sup>1</sup> If no method is provided by the company for transferring its stock, or no book furnished in which the transfer can be entered, an effectual legal and equitable title will pass even against the company by delivery of the certificate with a power of attorney to transfer, and the original stockholder will not be liable for calls upon the stock transferred, made subsequent to the transfer.<sup>2</sup> So the corporation may expressly, or by an established course of dealings to the contrary, waive the formalities for transferring stock prescribed in their by-laws or rules.<sup>3</sup> There may also be a waiver on the part of the corporation by the failure or neglect of its officers.<sup>4</sup> The instrument of sale and power to transfer are generally printed on the back of the certificate, and are ordinarily in the following form :

For value received      do hereby sell, assign, and transfer to  
    shares of the capital stock of the      Company, of one  
 hundred dollars each, standing in      name on the books of the said company, and represented by the within certificate, and do hereby irrevocably constitute and appoint      , attorney, to execute a surrender and cancellation of the within certificate, and also to do all things requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary, or be required by the regulations of the said company, in that behalf, with full power of substitution in the premises.

Dated      , 188 .

In presence of      \_\_\_\_\_

<sup>1</sup> Burrall vs. Bushwick R. R. Co. (Bereich vs. Marye, 9 Nev. 312; State vs. Pettineli, 10 id. 141).  
 75 N. Y. 211.

<sup>2</sup> Isham vs. Buckingham, 49 N. Y. 216; see also Ex parte Bagge, 13 Beav. 162. Under the laws of California, the legal title to mining stock, except as between the parties, can be acquired only by transfer upon the books of the corporation

<sup>3</sup> Chambersburg Ins. Co. vs. Nichols, 1 Jones (Pa.), 120; Walters's Case, 19 L. J. (Ch.) 501; Bargate vs. Shortridge, 5 H. L. Cas. 297.

<sup>4</sup> Hill's Case, L. R. 4 Ch. App. 769, note (2).

This regulation of corporations requiring the transfer of stock to be made on their books is necessary not only for their protection, but it is absolutely essential to enable them to transact business with their stockholders. By this means a corporation is enabled to know who its stockholders are, and, if necessary, promptly to communicate with, or notify, them in respect to matters appertaining to their business. And it is now settled, as a general rule, that a corporation is only bound to recognize those persons as stockholders who appear so by record.<sup>1</sup> And this rule is peculiarly applicable to questions where the right to vote or the title to dividends is involved; although, in levying assessments or calls, it has been decided that a corporation may go behind its record; and hold the true owner liable when he is represented on its books by an agent or other person not having any beneficial interest in the stock.<sup>2</sup>

Accordingly, where the certificate provides that a transfer can only be made on the books upon the production of the certificate, the company has no right to issue new stock without the production of the certificate. And where A, to whom shares were issued by a company, executed upon the certificate a power of attorney for their sale to B, and delivered to the latter the certificate, but no transfer was made upon the books during A's lifetime, and twenty years afterwards A's administrator procured the transfer of the shares upon the books of the company, the latter was held liable to B for the shares, because they could not be lawfully transferred without the surrender of the certificate, which had been issued to authenticate the right of the person named in it to them.<sup>3</sup>

<sup>1</sup> *Brisbane vs. D. L. & W. R. R. Co.*, Hill (N. Y.), 624; *Johnson vs. Underhill*, 52 N. Y. 203.

*N. Y. Daily Reg.* Nov. 30, 1881; *Manning vs. Quicksilver Mining Co.* 24 Hun, 360.

<sup>2</sup> *Davis vs. Stevens*, 1 Am. Law Rev. (n. s.) 84; *Adderly vs. Storm*, 6

<sup>3</sup> *Brisbane vs. D. L. & W. R. R. Co.* supra; *N. Y. & New Haven R. R. Co. vs. Schuyler*, 34 N. Y. 30, 33; *Strange vs. Houston & Texas Cent. R. R. Co.* 53 Texas, 163.

And the corporation is liable in such case, although in its by-laws it is declared that certificates may be issued on the special order of the board of directors, in place of those lost or destroyed, on proof of loss and receiving indemnity. The issuing of a certificate under such a by-law does not affect the liability of the corporation to the holder of the certificate.<sup>1</sup>

As corporations are trustees for the property and title of each owner of their stock, being custodians of the primary evidence of title, they are held to proper care and diligence in its preservation, and ought, before permitting the transfer of stock which appears on the faith of the certificate to be held in trust, to require an exhibition of the trustee's authority to transfer, and without it cannot be compelled to make the formal transfer on their books.<sup>2</sup>

In *Webb vs. Graniteville Manuf'g Co.*,<sup>3</sup> the infant plaintiffs owned stock in the defendant corporation, standing in the name of "P., guardian." The guardian placed the certificate with a blank endorsement in the hands of D., his counsel, for purposes connected with his trust. D. procured an order of court permitting a sale and investment, and then hypothecated the certificate to the S. Bank as security for a loan for his personal use. H., who was president of the bank, and also of the defendant, with another purchased the stock from the bank, and had it transferred by the defendant to the purchasers. Held, that the defendant was chargeable with knowledge of the trust and its beneficiaries, and liable to respond to the plaintiffs for the stock. And in *Lowry vs. Commercial Bank*,<sup>4</sup> it was held that the defendant was bound to take notice of and examine the will, and because of its negligence in

<sup>1</sup> *Cleveland & Mah. R. R. Co. vs. Barb.* 534; *Mich. Bank vs. N. Y. etc. Tappett*, Sup. Ct. Ohio, 1 Am. Law. 36 id. 200, 4 Duer, 480.  
Rev. (n. s.) 396, 397.

<sup>3</sup> 11 S. C. 396.

<sup>2</sup> *Bayard vs. Farmers' etc. Bank*,  
52 Pa. St. 232; *Bruff vs. Mali*, 38

<sup>4</sup> 3 Am. L. J. (n. s.) 111.

omitting to do so it was held responsible for not preventing the executor from making the transfer.<sup>1</sup>

In respect to voting at corporate elections, the general rule is that the right to vote is restricted to the registered owners of the stock on the books of the company.<sup>2</sup> Even if a person has sold his stock, if his name is on the books, and the stock has not been transferred, the registered owner has the right to vote.<sup>3</sup> But while the books of the company may generally be conclusive as to the right to vote at a corporate election, as between itself and a person seeking to exercise this franchise who is not a registered owner, it by no means follows that it precludes all inquiry into the question as to who is the real owner of the stock, and consequently entitled to vote thereon; for it is well settled that a stockholder of a corporation who has pledged his stock is entitled to vote thereon:<sup>4</sup> so is a *cestui que* trust where the stock stands in the name of a trustee.<sup>5</sup>

To give, therefore, the transfer-books such a binding effect as to shut out all inquiry in every case might enable the directors or other persons to control the election to the injury of the real owners. It has accordingly been held, in a number of cases, that where it appears the nominal and registered owners of stock have voted contrary to the instructions of the real owners, the courts will, by quo warranto or other authorized proceeding, inquire into the question; and, if the election

<sup>1</sup> *Atkinson vs. Atkinson*, 8 Allen, p. 137, note 5; *Merchants' Bank vs.* 15; *Sutting vs. Thomasson*, 57 Ga. Cook, 21 Mass. 405.

<sup>2</sup> *People vs. Tibbetts*, supra; see also, as to general right of voting on shares, *Gilbert vs. Iron Co.* 11 Wend. 418; *In re Mohawk & H. R. Co.* 19 Wend. 135; *Lowry vs. Commercial & F. Bank*, Taney's Dec. 310.

<sup>3</sup> *In re Cecil*, 36 How. Pr. 477; *People vs. Tibbetts*, 4 Cow. 358; *People vs. Kip*, id. 382, note; s. c. Mass. 90.

<sup>4</sup> *Ante*, p. 138, note 1.

<sup>5</sup> *Id.*; *Ex parte Willcocks*, 7 Cow. 402; *Matter of Long Island R. R. Co.* 19 Wend. 37; *ante*, 402.

has been produced by such illegal votes, it will set the same aside.<sup>1</sup> And in one case in New York an election of directors was set aside under the statute, it appearing, by affidavits, that at the time of the election one L, who offered to vote on certain shares and was refused, and whose vote, if it had been received, would have changed the result, was the owner of such shares by assignment from the individual in whose name they stood upon the books, and that he had applied at the proper place to have the transfer entered upon the books, which was refused for the reason that the stock had already been declared forfeited for default in payment of calls, the court being of opinion that the directors had no power to declare the stock forfeited, and that the proceeding in that regard was void.

But it will be observed that the New York cases were determined under statutes of that State, giving the courts power to inquire into, and, in certain cases, to set aside, elections.<sup>2</sup> The effect of the rule, by which all persons are excluded from participation in the affairs of the company whose names do not appear as stockholders on the books of the company, is at times to surrender the management and control of the body to persons who have no interest or ownership in the same. For illustration, most of the business corporations in this country, previous to an annual meeting or election, give public notice through the newspapers that on and after a certain date their books will be closed, and will remain so until after a certain date. The object of this notice is to enable the corporation to determine definitely who constitute its stockholders, and it is a practice that has been universally recognized as very reasonable and proper; indeed, there seems to be no other method that is consistent with the safe and prudent

<sup>1</sup> Strong vs. Smith, 15 Hun (N. Y.), 222, and cases there cited.      <sup>2</sup> 1 Rev. Stat. N. Y. 603.

management of the body. But the effect of it is to exclude the true owners of the stock of the company from any voice or control in its management; for although two thirds or more of the entire capital stock may be sold and assigned after the books have closed, and before the annual meeting, yet the nominal stockholders of record are the only ones entitled to vote! The question seems never to have directly arisen between such nominal registered owners and the real owners and holders of the stock of the company; but the courts might, if properly applied to, restrain the nominal owners from voting on the stock against the wishes or interests of the true owners, or compel them to give proxies to, or vote as directed by, the real holders of the stock. It is a grave question whether it is not against public policy to deprive the true owner of stock from voting and participating in the general management of the corporation, and to confer such right upon persons who are in no wise interested in the same save as they appear upon the books as stockholders.<sup>1</sup>

<sup>1</sup> Closely akin to the above subject is the question of the right to vote by proxy, which we should perhaps briefly allude to in this connection. The general rule is that the right to vote by proxy does not exist as a general right, but the party claiming it must show a special authority for that purpose: *Angell & Ames on Corp.* § 128 et seq.; *Morris vs. Mowatt*, 2 Paige, 590; *Phillips vs. Wickham*, 1 id. 590; *State vs. Tudor*, 5 Day, 329 (the authority of this last case Kent thinks is shaken, 2 Kent Comm. 294, note); *Taylor vs. Griswold*, 2 Green (N. J.), 223; *In re Barker*, 6 Wend. 509; *Ex parte Holmes*, 5 Cow. 426; *Ex parte Willcocks*, 7 id. 402. But it seems that an owner of corporate stock in a commercial association may delegate his rights in it to his agent or attorney, so that in his

absence he may be represented. And *Angell & Ames*, § 493, think that such agent or attorney would have all the rights the owner would have if he were present at the meeting; and this would seem to be the most reasonable doctrine (*Campbell vs. Pultney*, 6 Gill & J. 94; *In the matter of Mohawk R. R.* 19 Wend. 135; *In re Barker*, 6 id. 509).

*As to form of proxies.* Party will be restrained to the object for which proxy was given (*Matter of Wheeler*, 2 Ab. Pr. (n. s.) 361). Proxy need not be acknowledged (*Matter of Cecil*, 36 How. Pr. 477). Where proxies are given and lost, parole evidence may be given as to their contents (*Haywood P. R. Co. vs. Bryan*, 6 Jones (N. C.), 82). Trustees having stock in their names entitled to vote (*Matter of North Shore S. I. Ferry Co.* 63 Barb. 556; *Hoppin vs. Buffum*, 9 R. I. 513).

*(b.) Transfer between Parties.*

As between the immediate parties to a transaction in stocks—*e. g.*, vendor and vendee, pledgor and pledgee, etc.—an effectual transfer of the interest of the owner in the corporate property may be made by the mere delivery of the certificate with power of transfer executed in blank,<sup>1</sup> irrespective of the requirements of the rules and regulations of the company issuing the stock.<sup>2</sup>

If there is no legislative regulation as to the mode of transferring title to stock, the method of transfer must be determined on general principles of law based on sound reason and public policy. As was said by the Supreme Court of Indiana, "Stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he

Stock owned by partnership in name of one partner, the surviving partner, and not administrator, has the right to vote (*Allen vs. Hill*, 16 Cal. 113). A stockholder may revoke his proxy authorizing another to vote, though it was given for value, if necessary to prevent a fraudulent use of it (*Reed vs. Bank of Newburgh*, 6 Paige, 337). Under § 3 of the General Manufacturing Act of N. Y., 1848, stockholders may vote either in person or by proxy; but under the act of June 21, 1875, entitled An Act to Provide for and Regulate Certain Business Corporations, § 26, "no person shall be permitted to vote upon the proxy of a stockholder in any such corporation after the lapse of eleven months from the date thereof, unless the stockholder shall have specified therein that it is to continue in force for some longer and limited time."

<sup>1</sup> *Commissioners vs. Reynolds*, 13 Am. Law Reg. 380; *Johnston vs. Lafflin*, 2 Morison's Trans. Sup. Ct. U. S.

590; s. c. *Thompson's Nat. Bank Cases*, 331; *Comeau vs. Guild Farm Oil Co.* 3 Daly (N. Y.), 218; *Continental Nat. Bank vs. Elliott Nat. Bank*, U. S. Circuit Ct. (Mass.) 24 Alb. L. J. 149; *Ross vs. Southwestern R. R. Co.* 53 Ga. 514; *Smith vs. Crescent City Stock Landing, etc. Co.* 30 La. Ann. 1378; *Duke vs. Cahawba Nav. Co.* 10 Ala. 82; *Eames vs. Wheeler*, 36 Mass. 442; *Weston vs. Bear River etc. Co.* 6 Cal. 425; *People vs. Elmore*, 35 id. 653; *Brewster vs. Hartley*, 37 id. 15.

<sup>2</sup> *Howe vs. Starkweather*, 17 Mass. 243; *Sargent vs. Franklin Ins. Co.* 25 id. 78; *United States vs. Vaughn*, 3 Binn. 394; *Munn vs. Barnum*, 24 Barb. 283; *Noyes vs. Spaulding*, 27 Vt. 420; *Orr vs. Bigelow*, 20 Barb. 21; *Baldwin vs. Canfield*, 26 Minn. 43. But an absolute transfer of the certificates may always be shown by parol testimony to be a pledge and not a sale, *Newton vs. Fay*, 92 Mass. 505; *Lauman's Appeal*, 68 Pa. St. 88.

sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce, and is bought and sold in the market like any other marketable commodity.”<sup>1</sup>

As the capital stock of corporations is incapable of manual delivery, a symbolical delivery is universally recognized by the courts, and the title passes through the instrumentality of the scrip or certificate.<sup>2</sup> And where a contract for the sale of shares of the capital stock of a corporation deliverable at a future day has been made, a tender of the certificates of stock with a blank power of attorney in the usual form is a good tender; and upon refusal of the vendee to take and pay for the same, the vendor may recover the contract price.<sup>3</sup>

*(c.) Transfer as to Third Persons.*

By the universal practice of corporations, shares of stock are transferable on the books of the company by delivery and cancellation of the old certificate and the issuing of a new one; and the question has frequently arisen whether there can be a valid and effectual transfer, so far as the rights of third persons are concerned, without a compliance with these formalities. While the decisions are conflicting upon this subject, the weight of authority is that there can be such a transfer; and the proposition may be regarded as established, both by reason and precedent, that the holder of stock may transfer the same by assignment and delivery of the certificate, and no transfer upon the books of the company is necessary; and the transferee takes title against all outside per-

<sup>1</sup> Commissioners vs. Reynolds, 13 Am. Law Reg. 380. See also an elaborate review of the authorities in Johnston vs. Laffin, 2 Morison's Trans. Sup. Ct. U. S. 590; s. c. Thompson's Nat. Bank Cases, 331.

<sup>2</sup> Wilson vs. Little, 2 N. Y. 443. See also Ch. X., "Statute of Frauds."

<sup>3</sup> Munin vs. Barnum, 24 Barb. 283; Noyes vs. Spaulding, 27 Vt. 420; Orr vs. Bigelow, 20 Barb. 21.



sons, whether the transfer is absolute or for the purpose of collateral security, provided, of course, it is *bona fide*.<sup>1</sup>

The regulations of the companies requiring the transfer to be made on their books is considered to be for the protection of the company only, and is not intended to affect the rights of a *bona fide* holder or purchaser in a contest between the assignor and his creditors, or third persons acquiring rights from him subsequent to and without the possession of the certificate.<sup>2</sup> The possession of the certificate, with a power to transfer endorsed thereon in blank, is *prima facie* evidence of title; and if the possessor has given value, his title should not be impeached by subsequent purchasers dealing with the registered owner without a certificate, much less by his creditors; although it must be acknowledged that there is an array of decisions against these views, which leaves the subject in a very doubtful and unsatisfactory condition.

Before proceeding to give the arguments pro and con upon this question, it may be well to allude to a few proposi-

<sup>1</sup> Commissioners vs. Reynolds, 13 Am. Law Reg. 380; Johnston vs. Laffin, 2 Morison's Trans. Sup. Ct. U. S. 590; s. c. Thompson's Nat. Bank Cases, 331; Oerther vs. First Nat. Bank, 20 Alb. L. J. 142; Driscoll vs. West Bradley et al. Co. 4 J. & S. 488, 59 N. Y. 96; Comeau vs. Guild Farm Oil Co. 3 Daly, 218; Continental Nat. Bank vs. Elliott Nat. Bank (U. S. Circuit Ct.), 24 Alb. L. J. 149; Ross vs. Southwestern R. R. Co. 53 Ga. 514; Duke vs. Cahawba Nav. Co. 10 Ala. 82; Eames vs. Wheeler, 36 Mass. 442; Sargent vs. Essex Marine Co. 26 id. 202; Quiner vs. Marblehead Social Ins. Co. 10 id. 476; Commw. vs. Watmough, 6 Whart. (Pa.) 139; Smith vs. American Coal Co. 7 Lans. 317; Newberry vs. Iron Mfg. Co. 17 Mich. 144; Bank of Utica vs. Smalley, 2 Cow. 770; Blouin vs. Hart, 30 La. Ann. 714. The cases contrary to the above are: Fisher vs. Essex Bank, 71 Mass. 373; Boyd vs. Rockport Steam Cotton Mills, 73 Mass. 406; Northrop vs. Newton etc. Turnpike Co. 3 Conn. 544; Oxford Turnpike Co. vs. Bunnell, 6 id. 552; Dutton vs. Connecticut Bank, 13 id. 498; Shipman vs. Aetna Ins. Co. 29 id. 245; Lockwood vs. Bank, 9 R. I. 305; Sabin vs. Woodstock, 21 Vt. 353; Pinkerton vs. Railroad Co. 42 N. H. 424; People's Bank vs. Gridley, 91 Ill. 457; Weston vs. Bear River Co. 6 Cal. 186; Naglee vs. Pacific Wharf Co. 20 id. 529; Williams vs. Mechanics' Bank of New Haven, 5 Blatchf. 59; Brown vs. Adams, 5 Biss. 181; Bank of Commerce's Appeal, 73 Pa. St. 59.

<sup>2</sup> Consult also Farmers' Gold Bank vs. Wilson, 8 Pacific Coast L. J. 371.

tions which seem to be acquiesced in by all of the authorities as tending to strengthen the position which we have assumed in the controversy. In the first place, it is settled by a decision in Massachusetts<sup>1</sup> that a corporation cannot make a by-law which prohibits the transfer of stock unless made at the office of the company, in person or by attorney, and with the assent of the president of the company. Such a by-law is void as in restraint of trade.

In the second place, a transfer by a stockholder of his stock in an incorporated or joint-stock company passes his interest to the purchaser, although the transfer be not made in conformity to the rules and by-laws of the company.<sup>2</sup>

In the case of *Gilbert vs. Manchester Iron Manufacturing Co.*, the court said: "The rules and by-laws of a company which prohibit any transfer except upon the books of the company and upon notice . . . have reference either to the right of voting or to the security of the company by way of a lien upon the stock for any indebtedness of the stockholder, and do not incapacitate such stockholder from parting with his interest. The purchaser acquires the right of the property which the seller had. If the stock is under encumbrance, it remains so; if it cannot be voted upon unless transferred twenty days before an election, and the transfer is made ten days previous, then it cannot be represented in that election."

In the third place, where, by the deed of settlement or by-laws, no person shall become a transferee of stock without the approval of the directors, the latter cannot exercise their power arbitrarily and refuse unreasonably to permit any transfer at all to be made.<sup>3</sup>

<sup>1</sup> *Sargent vs. Franklin Ins. Co.* 25 Mass. 98. hill, 52 N. Y. 203; and cases cited ante, p. 623, n. 1.

<sup>2</sup> *Gilbert vs. Iron Mfg. Co.* 11 Wend. 628; *Utica Bank vs. Smalley*, 2 Cow. 770; *Johnson vs. Under-* <sup>3</sup> *In re Gresham Life Ass. Soc.*, Ex parte Penney, L. R. 8 Ch. App. 446; *Robinson vs. Chartered Bank*, L. R.

It is thus seen that the courts are in substantial accord upon these propositions, and they exhibit a decided tendency and inclination to prevent all obstruction to the free transfer of stock; and, as we shall see hereafter, going so far in the commercial State of New York as to hold that such transfers are good even as against the corporation itself when the latter undertakes to clog the same with a condition which it has no express power to impose.<sup>1</sup>

There are, however, the two classes above referred to where the decisions are utterly irreconcilable: 1st, in contests between the *bona fide* holders or purchasers of certificates and the creditors of the vendor or assignor; and, 2d, in contests between such holders or purchasers and subsequent purchasers who have dealt with the registered owner of the stock, but without a certificate.

1st. In contests between the *bona fide* holders or purchasers of certificates and the creditors of the vendor or assignor. It is utterly impossible to harmonize the authorities upon this subject, but we believe the most reasonable doctrine to be that such holders or purchasers should be protected against all the world, whether creditors or otherwise, and whether they have notice or not. Of course, if such third persons have notice of the rights of the *bona fide* holders or purchasers, it is plain that they should not be allowed to intervene; and, if they have no notice, then their claims should succumb to the superior rights and equities of the *bona fide* purchasers and holders.

The main argument against this view seems to be that, if the law should allow a person who has sold his stock still to retain his title upon the books of the company, he would be enabled to obtain credit on a false basis; and that the vendee

1 Eq. 32; *Moffatt vs. Farquhar*, L. R. *Farmers and Merchants' Bank vs.*  
7 Ch. Div. 591. But see *Murray vs. Wasson*, 48 Iowa, 336.  
*Bush*, L. R. 6 H. L. 37; *Re Stanton* <sup>1</sup> *Driscoll vs. West Bradley Co.* 59  
*Iron and Steel Co.* L. R. 16 Eq. 559; N. Y. 96.

would be a party to the fraud, for he has it in his power to have the stock transferred in the proper way.<sup>1</sup> And in *Sabin vs. Bank of Worcester*,<sup>2</sup> Redfield, J., said: "We entertain, however, upon the present argument, no reasonable doubt that the mode of transfer of the stock pointed out by the charter is the only mode which the public are bound to regard as conveying the title. All persons unaffected with notice to the contrary are at liberty to act upon the faith of the title being where it appears upon the books of the corporation to be." But this argument is not very cogent, for the reason that if a person obtains credit upon the representation that he owns stock which he does not own, or commits any other fraud by virtue of his nominal ownership on the books of the company, he is liable to the person who relies upon such representation, or who is otherwise defrauded. Moreover, the argument is unfounded in fact, and this sufficiently appears from the views expressed by Kennedy, J.,<sup>3</sup> who clearly shows that there is very little danger of the outside world being affected by those things of which they have no knowledge. "Stock," said that learned judge, "is incapable of such possession so as to make it known or notorious who has the use or benefit of it, and thus raise a general belief in regard to the ownership thereof. Even its existence may be unknown, excepting comparatively to but few persons. The only evidence that can be safely trusted as to this is the books of the bank or corporation; but they, being of a private nature, *are not open to public inspection*. Hence it is that the ownership of such stock, though held by the owner in his own name on the books of the corporation, is not supposed to have given him a general credit with the world." And as the acts

<sup>1</sup> *Pinkerton vs. Manchester & L. R. Co.* 42 N. H. 424; *Angell & Ames on Corp.* § 578 et seq.

<sup>2</sup> 21 Me. 353.

<sup>3</sup> *Commw. vs. Watmough*, 6 Whart. 139.

of stockholders, in their official capacity, are also not revealed to the public, the same reasoning would apply to them.

But, above and beyond all this, the true policy of the law is to protect these securities in the hands of *bona fide* holders or purchasers. These certificates pass from hand to hand; and, by well-recognized commercial usages, the transfer on the books of the corporation, as to the outside world at least, is regarded as of only secondary importance.<sup>1</sup>

2d. In contests between *bona fide* holders or purchasers of stock certificates and third persons who have subsequently dealt with the registered owner of the stock, but without a certificate. As has been seen, the certificate is the muniment of title; and if a person chooses to deal with one who is merely the registered owner on the books of the company, but has not the possession or control of the certificate, he takes the risk of meeting the claims of a *bona fide* holder or purchaser to whom the certificate has been delivered, and whose claim will be protected.<sup>2</sup>

#### *IV. Lien of Corporation for Debts.*

By the common-law a corporation has no claim or lien upon the stock it issues; the reason being that a different rule would subvert the wholesome doctrine of that law against secret liens.<sup>3</sup> Nor has a corporation the right to create such a lien, unless it has authority by virtue of its charter or the general law under which it is incorporated. The policy of the law is to protect a *bona fide* purchaser of stock certificates; and a by-law of a company providing that no stock shall be allowed to be transferred on the books of the company if the person in

<sup>1</sup> See views of Chanc. Green, *Broadway Bank vs. McElrath*, 13 N. J. Eq. 24; *Driscoll vs. West Bradley & C. M. Co.* 59 N. Y. 96.

<sup>2</sup> See *Farmers' Gold Bank vs. Wilson*, 8 Pacific Coast L. J. 371.

<sup>3</sup> *Driscoll vs. West Bradley & C. M. Co.* supra, and authorities there cited; *Neale vs. Janney*, 2 Cranch (C. Ct.), 188; *People vs. Crockett*, 9 Cal. 112; *Farmers & Merchants' Bank vs. Wasson*, 48 Iowa, 336.

whose name the stock shall stand shall be indebted to the company, unless with the consent of the president or treasurer or by a vote of the board of trustees, is void unless authorized by charter or the general law.<sup>1</sup> And such authorization will not be implied from the general powers to make by-laws for the management of the corporation and its affairs, or the power to make by-laws for the transfer of its stock.<sup>2</sup> But there are authorities for the proposition that a holder of stock is bound by a usage of the company, or by an informal regulation, made known at the time of taking his certificate; that the company has a lien thereon for an indebtedness, and that assignees in insolvency of such a stockholder are also bound.<sup>3</sup> So a corporation may have the power, by express statute, to create a lien upon its stock for an indebtedness due it from a stockholder, which would be binding even upon a *bona fide* purchaser or holder without notice.<sup>4</sup>

These questions were all examined in the case of Driscoll vs. West Bradley & C. M. Co.,<sup>5</sup> by the New York Court of Appeals, in 1874, and all of the authorities referred to and distinguished: The court refused to permit a corporation to set up a lien for a debt against a *bona fide* purchaser of the debtor, where the power to create the lien was not expressly given by statute. Mr. Chief-justice Folger held that to imply such an authority from the grant of general powers would be not only in opposition to the policy of the common-law, which, as before observed, is against the existence of secret liens, but it

<sup>1</sup> Id.

<sup>2</sup> Id. See also Bullard vs. Nat. Eagle Bank, 18 Wall. 589—which authorities are in seeming conflict with Lockwood vs. Mechanics' Nat. Bank, 9 R. I. 308; Child vs. Hudson Bay Co. 2 P. Wms. 207; McDowell vs. Bank, 1 Harr. (Del.) 27, 369; Tuttle vs. Walton, 1 Ga. 43; Mechanics' Bank vs. Merchants' Bank, 45 Mo. 513; but

see comments of Folger, J., in Driscoll vs. West Bradley & C. M. Co., supra, where he reviews these authorities, and holds that they do not conflict with that case.

<sup>3</sup> Waln vs. Bank of N. Am. 8 Serg. & R. 73; Vansands vs. Middlesex Co. Bank, 26 Conn. 144.

<sup>4</sup> Driscoll vs. West Bradley & C. M. Co. 59 N. Y. 96.

<sup>5</sup> Supra.

would be also in opposition to the policy of the law in its particular dealings with this kind of property. "Shares of stock," said the court, "are in general personal property, to be dealt with as such, and with as much freedom and ease. The right to them is a chose in action, and, though not transferable so as to give the same safety in dealing as is given to a *bona fide* taker of negotiable paper, the current of authority in this State is to the protection of the *bona fide* vendee against secret or equitable liens thereto of one who has induced the vendor with the *indicia* of ownership. It is evident that such a by-law as this in question, not made known upon the certificate of stock issued by the corporation, if it is to be upheld is a very serious hinderance to the ease and safety with which sellers and buyers of shares of stock may deal therewith."<sup>1</sup>

### *V. Forged Transfers.*

Very many questions arise out of the forgery of powers of attorney to transfer stocks, which will be best illustrated under the following heads:

1st. *The position of a corporation issuing a stock certificate to the real owner and to a party claiming title thereunder by forgery or otherwise.*

No person can be deprived of his property in the absence of assent or negligence on his part. Stock certificates being non-negotiable, and in no way different from other choses in

<sup>1</sup> In *Second Nat. Bank vs. Nat. Hartford Life etc. Co.* 45 Conn. 22, State Bank, 7 Chicago Leg. News, 70, where the lien of a corporation for it was held that a bank can neither create nor hold a lien upon its shares of stock to pay a subsequent indebtedness from the stockholder to the bank as against the pledgee of such stocks for value. See also *Morgan vs. Bank of North America*, 11 Am. Dec. 582, and note by Mr. Proffat. Also 7 Southern Law Rev. 450, 21 Am. Law Reg. 57, note.

action, it follows that the owner of a lost or stolen certificate which is put into circulation by the forgery of his name to a power, transfer, or assignment is not thereby prejudiced in his rights. A sale under such circumstances, even to a *bona fide* purchaser for a valuable consideration, vests no higher title in him than was possessed by the vendor.<sup>1</sup>

If the corporation, misled by a forgery, cancels his certificate and issues a new one to an innocent person who derives title under the forged transfer, the owner is entitled to have his name restored to its books and to a new certificate.<sup>2</sup> This right, however, may be lost by negligence or culpable conduct on his part.<sup>3</sup>

Due care and diligence will be required on the part of the corporation to assure itself of the validity of the title of the person presenting the paper purporting to be a transfer and requesting to be recorded as a stockholder.<sup>4</sup>

And a failure on the part of the corporation to require a surrender of the certificate or proof of its loss, in conformity with the terms of the certificate, statute, or by-laws, renders it liable to an innocent transferee.<sup>5</sup>

<sup>1</sup> Pratt vs. Taunton Copper Mfg. Co. 123 Mass. 110; Same vs. Machinists' Nat. Bank, id.; Pollock vs. Nat. Bank, 7 N. Y. 274; Johnston vs. Renton, L. R. 9 Eq. 181; Sloman vs. Bank of England, 14 Sim. 475; Cotnam vs. Eastern Counties Ry. Co. 1 John. & H. 243; Prescott vs. De Forest, 16 Johns. 159.

<sup>2</sup> Western Union Tel. Co. vs. Davenport, 97 U. S. 369; Swan vs. North-British Australasian Co. 2 Hurl. & C. 175; Johnston vs. Renton, L. R. 9 Eq. 181; Johnson vs. Parsey, id.; Pratt vs. Taunton Copper Mfg. Co. supra; Brown vs. Howard Fire Ins. Co. 42 Md. 384; Pollock vs. Nat. Bank, 7 N. Y. 274; Hambleton vs. Central Ohio R. R. Co. 44 Md. 551. But see Hunter vs. Walters, L. R. 11

Eq. 292, 319-320; and compare Taylor vs. The Great Indian Peninsula Co. 4 De G. & J. 559.

<sup>3</sup> Friedlander vs. Slaughter House Co. 31 La. Ann. 523; Coles vs. Bank of England, 10 Ad. & E. 437; Pennsylvania R. R. Co.'s Appeal, 86 Pa. St. 80.

<sup>4</sup> Western Union Tel. Co. vs. Davenport, 97 U. S. 369; Salisbury Mills vs. Townsend, 109 Mass. 115; Loring vs. Salisbury Mills, 125 id. 138; Campbell vs. Morgan, 4 Brad. (Ill.) 100; Cleveland & Mahoning R. R. Co. vs. Tapett (Ohio S. Ct.), 22 Alb. L. J. 117; Bayard vs. Farmers & Mechanics' Bank, 52 Pa. St. 232; Pennsylvania R. R. Co.'s Appeal, 86 id. 80; Williams vs. Greggs, 2 Strobb. (S. C.) Eq. 316.

<sup>5</sup> Brisbane vs. Del., Lack., & W. R.



In *Chew vs. Bank of Baltimore*<sup>1</sup> a transfer of stock under a bill of sale and power of attorney from a lunatic was avoided to the bank's loss, though there was no actual fault on the part of the bank; and the loss was cast upon the latter on considerations of justice and expediency as being best able to provide against it, because the bank might have refused to recognize the power of attorney, and required the personal attention for the purpose of determining such matters as might give rise to disputes.

And an assignee of certificates of shares of stock who leaves the certificates with the assignments unrecorded in the possession of the assignor is not thereby guilty of negligence so as to be estopped to set up his title against a person who claims title to the certificates through an alteration of the assignments by the assignor.<sup>2</sup> Nor can the owner of stock who has executed an assignment of a portion thereof, with ordinary care in the mode of filling up the blank form, be deprived of a greater portion by a subsequent fraudulent alteration which purports an assignment of the whole; and if the corporation acts on such altered assignment, it is liable in damages for transferring the excess.<sup>3</sup> Where the assignment was made in blank to be used for a particular purpose, and the person receiving it, after filling the blank with one name, erased it and inserted another, his authority to fill the blank was held to be exhausted by the first insertion.<sup>4</sup>

The decision of the Supreme Judicial Court of Massachusetts in a recent case in that State<sup>5</sup> will further illustrate the

R. Co. N. Y. *Daily Reg.* Nov. 30, 1881; <sup>3</sup> *Sewall vs. Boston Water Power*  
Bridgeport vs. N. Y. & N. H. R. R. Co. Co. 86 Mass. 217.

30 Conn. 231-270; *Bank vs. Lanier*, <sup>4</sup> *Denny vs. Lyon*, 38 Pa. St. 98. See  
11 Wall. 369; *Factors & T. Ins. Co.* also *Merchants' Bank vs. Livingston*,  
*vs. Marine Dry Dock Co.* 31 La. Ann. 74 N. Y. 223, where the case of *Mc-*  
149; *Cleveland & Mahoning R. R.* *Neil vs. Tenth Nat. Bank* is distin-  
*Co. vs. Robbins*, 35 Ohio St. 483. guished.

<sup>1</sup> 14 Md. 299.

<sup>2</sup> *Eaton vs. New England Tel. Co.* <sup>5</sup> *Pratt vs. Taunton Copper Mfg.*

68 Me. 63.

Co. 123 Mass. 110.

foregoing principles. Briefly, the facts were these: Plaintiff was the owner of shares of stock in the defendant company, for which she had a certificate. This certificate was taken from her house without her knowledge, and, together with a forged power of attorney in her name to the company, authorizing it to transfer the same, was delivered to a Stock-broker, who procured a new certificate, which was sold to an innocent purchaser, to whom the company issued another certificate. Plaintiff brought a bill in equity against the company and the purchaser, praying that the latter be compelled to surrender his certificate, and the former to issue a new certificate for the shares of stock held by her. The court held that the plaintiff could not be deprived of her stock without her consent or negligence on her part; and that, the power of attorney in her name being forged, she might maintain the bill to compel the company to issue a certificate to her for her shares, and to pay her the dividends thereon.<sup>1</sup>

The owner of lost or stolen certificates of stock has the following remedies:<sup>2</sup> 1st. He may either bring suit against the corporation, when his right of ownership is denied and contested, to compel it to recognize him as a stockholder.<sup>3</sup> 2d. Or for cancelling a certificate and allowing a transfer in violation of a stockholder's rights, he may bring an action against

<sup>1</sup> This holding is supported by the cases of *Ashby vs. Blackwell*, 2 Eden, 299; *s. c. Amb.* 503; *Sloman vs. Bank of England*, 14 Sim. 475; *Midland Railway vs. Taylor*, 8 H. L. C. 751; *Pollock vs. Nat. Bank*, 7 N. Y. 274; *Sewall vs. Boston Water Power Co.* 86 Mass. 277; *Brown vs. Howard Ins. Co.* 42 Md. 384; *s. c.* 20 Am. Rep. 90. See also *Machinists' Nat. Bank vs. Field*, 126 Mass. 345; *Waterhouse vs. London Ry. Co.* 41 L. T. (n. s.) 553; *Hambleton vs. Central Ohio R. Co.* 44 Md. 551; *Western Union Tel. Co. vs. Davenport*, 97 U. S. 369.

<sup>2</sup> *Biddle vs. Bayard*, 13 Pa. St. 152.

<sup>3</sup> *McNeil vs. Tenth Nat. Bank*, 46 N. Y. 325; *Holbrook vs. New Jersey Zinc Co.* 57 id. 616; *Stinson vs. Thornton*, 56 Ga. 377; *Strange vs. Houston & T. C. R. R. Co.* 10 Rep. 28; *s. c.* 53 Texas, 162; *Loring vs. Salisbury Mills*, 125 Mass. 138; *Wood's Appeal*, 10 Rep. 125; *s. c.* 92 Pa. St. 378.

the party who has possession of the certificate, and compel its surrender or delivery to him as never having legally parted with it, or damages as the case may be.<sup>1</sup> But it seems that he cannot pursue both remedies in the same action.<sup>2</sup>

Should the corporation, however, issue a new certificate to the holder of a forged one, it would seem, from the case of *Pratt vs. Machinists' National Bank*, that his transferee or assignee in good faith will not be forced to surrender his certificate.<sup>3</sup> In this case it will be noticed the plaintiff's remedy against the corporation was clear and complete. But had she, in the first instance, brought her bill against the purchaser Dean alone, it is probable the practice in *Weaver vs. Barden*<sup>4</sup> would have been pursued, and the purchaser Dean compelled to restore the stock to her as never having legally parted with it, leaving him to his remedy, if any, against the corporation. And if the purchaser had claimed under a transfer which he knew, or was bound to know, to be forged or invalid, the owner's right of action would seem to be unquestioned.<sup>5</sup> In such a case, presenting considerations similar to those in *Pratt vs. Taunton Copper Mfg. Co.*, where the relief given to the plaintiff does not require or involve the decision of any question between co-defendants, the court, unless by consent, does not and cannot decide such a question so as to bind the co-defendants as

<sup>1</sup> *Davis vs. Bank of England*, 2 Bing. 393; *Sewall vs. Boston Water Power Co.* 86 Mass. 277; *Duncan vs. Luntley*, 2 Macn. & G. 30; *Pratt vs. Machinists' Nat. Bank*, 123 Mass. 110; *Marsh vs. Keating*, 1 Bing. N. C. 198; *Weaver vs. Barden*, 3 Lans. 338, and 49 N. Y. 286. And in *Monk vs. Graham*, 8 Mod. 9, an action of trover was maintained by the owner against a *bona fide* purchaser.

<sup>2</sup> *Pratt vs. Taunton Copper Mfg. Co.* 123 Mass. 110; *Same vs. Machinists' Nat. Bank*, id.; *Salisbury Mills vs. Townsend*, 109 id. 115; *Lowry vs. Commercial Bank*, Taney (C. C.), 310; *Bank vs. Lanier*, 11 Wall. 369; *In re Bahia & San Francisco Ry. Co.* L. R. 3 Q. B. 584.

<sup>3</sup> See also, on this point, cases cited in preceding note.

<sup>4</sup> 3 Lans. 338, and 49 N. Y. 286.

<sup>5</sup> *Cottam vs. Eastern Counties Ry. Co.* 1 John. & H. 243; *Johnston vs. Renton*, L. R. 9 Eq. 181; *Taylor vs. Great Ind. P. Ry. Co.* 4 De G. & J. 559; *Denny vs. Lyon*, 38 Pa. St. 98.

against each other, but leaves it to be settled in a proper suit between them.<sup>1</sup>

The question here arises, does the issuance of a certificate by the corporation to a person deriving title through a forged transfer estop the corporation from denying his title? Is it the duty of the corporation to make inquiries? and do registry and the issuance of the certificate amount to an affirmation that the transfer is correct? It seems not.

The questions squarely arose in the case of *Simm vs. Anglo-American Telegraph Co.*<sup>2</sup> upon the following facts: B. & Co. purchased upon the Stock Exchange £5000 stock in the defendant company. A transfer of the stock, purporting to be executed by C., the true owner, was lodged with the company by S. & Co., the nominees of B. & Co. The company, after sending the usual notice to C., registered S. & Co. as holders. B. & Co. then, to secure advances, obtained a transfer of the stock to the plaintiffs, who were in like manner registered as owners, the certificate being issued to them by the company. The advances being paid off, the plaintiffs continued to hold the stock as trustees for B. & Co. It was afterwards discovered that the transfer from C. was a forgery, and the company thereupon replaced C. upon the register, and refused to pay dividends to the plaintiffs or to acknowledge their title to the stock. Held, that B. & Co. being the real plaintiffs, the defendants were not estopped from denying the validity of the transfer to S. & Co.

There were three able opinions in that case, all assailing the theory of an estoppel and the duty of the company to make inquiries. Brett, L. J., used the following language:

<sup>1</sup> *Cottam vs. Eastern Counties Ry. Power Co.* 86 Mass. 277, 283; *Carlton Co. supra*; *Johnston vs. Renton, vs. Jackson*, 121 id. 591, 597; 16 Alb. supra; *Cottingham vs. Shrewsbury*, L. J. 251.

<sup>2</sup> 3 Hare Ch. 627; *Fletcher vs. Green*, 33 Beav. 426; *Sewall vs. Boston Water* 20 Am. Law Reg. (n. s.) 159.

"Now, it is a practice of companies, before registering, to make inquiry of the transferror; but they are not bound to do this on behalf of the transferee—they do it for their own benefit; and, indeed, if the transferee does not put credit in the Broker, he can himself make inquiry of the transferror. All the facts which caused B. & Co. to be put upon the register, and entitled them to a certificate, are as much known to them as to the defendants, and some of them are more within their knowledge than the company's. They know, for instance, what the contract with the Broker was, and it is quite as much their duty to make inquiries as it is the company's. All the company do is to put the names on the register, which act of the transferror, if valid, makes B. & Co. holders of the stock; but the company do this on the statement of B. & Co. The certificate is merely a statement that the company have accepted B. & Co. as holders, but does not allege any fact known to the company and not known to B. & Co."<sup>1</sup>

2d. *Position of a bona fide purchaser of a certificate issued by a corporation in exchange for one whose power of transfer was forged.*

We have seen that the purchaser of a forged certificate of stock acquires but the title of his vendor; that he buys upon the faith of the forged transfer, and that the issuance to him of a new certificate by the company introduces no element which can alter his legal position. But what is the position of a *bona fide* purchaser of this new certificate issued by a corporation in exchange for a forged transfer? It is evident that he purchases upon the faith of the corporation's certifi-

<sup>1</sup> The following cases were distinguished in the opinion of Bramwell, L. J.: *Knight vs. Witten*, L. R. Ex. 111. See also *Brown vs. Howard* 5 Q. B. 660; *In re Bahia and San Francisco R. R. Co.* L. R. 3 Q. B. 584; *Pickard vs. Sears*, 6 Ad. & E. 469; *Hart vs. Frontino Company*, L. R. 5 Ex. 111. See also *Brown vs. Howard* 5 Q. B. 660; *In re Bahia and San Francisco R. R. Co.* L. R. 3 Q. B. 584; *Fire Ins. Co.* 42 Md. 384.

cate, and that he is in a better position than the plaintiff was in *Simm vs. Anglo-American Telegraph Company*. The corporation has, in effect, made a representation in reliance upon which he has acted; and if, in so acting, he has suffered pecuniary damage, the corporation will be estopped from denying the truth of the bogus transfer.<sup>1</sup>

This subject was elaborately considered by the Circuit Court of the United States, District of Massachusetts.<sup>2</sup> In that case the facts were these: The defendant, the Massachusetts National Bank, loaned money to C., taking in good faith, as collateral security therefor, what purported to be a certificate of two hundred shares of the stock of a railroad company, issued by the company to the bank. The certificate, in reality, was a forgery by C. C. paying the loan, the cashier of the defendant bank, for the purpose of restoring the collateral to C., returned to him the certificate with his signature in blank as cashier to the printed form of transfer on the back. Subsequently C. obtained a loan from plaintiff, giving the said certificate as collateral. The forgery having been discovered, plaintiff brought action against defendant for the damages sustained by him. Held, that the signature of the cashier bound the bank, and that the bank so far warranted the genuineness of the certificate as to be estopped from setting up the forgery as a defence.

The court said: "The certificate in this case, as it came from the bank, contained on the same piece of paper, and on the back of the certificate, a blank assignment, which was all that was necessary to transfer the title of the stock as between the parties. The defendant must therefore be held to have intended and agreed that whoever should present the certificate,

<sup>1</sup> *Strange vs. Houston & T. C. R.* 10 R. Co. 10 Rep. 28; s. c. 53 Texas, 162; Alb. L. J. 199; s. c. 14 Am. Law Reg. Holbrook vs. New Jersey Zinc Co. 153. See also cases cited ante, p. 637, n. 1.

<sup>2</sup> *Matthews vs. Mass. Nat. Bank*, 10

so issued from the bank, with the assignment executed in blank, should be entitled to fill up the blanks with his own name, and to have a transfer of the stock made to himself on the books of the company. The certificate accompanied with the transfer, executed in blank, has a species of negotiability of a peculiar character, but one well recognized in commercial transactions and judicial decisions, and absolutely essential to the usages and necessities of modern commerce, to make such certificate available in commercial transactions. Even when such blank assignments, or powers of attorney to transfer stock, are under seal, the blanks may be filled up according to the agreement of the parties at the time.<sup>1</sup> The decisions to the contrary in the English courts have not been followed in this country, and they were influenced not merely by a rigid adherence to the technical rules of the common-law in relation to instruments under seal, but by the policy of the stamp system. But the case of *Walker vs. Bartlett*,<sup>2</sup> and late English decisions, recognize the validity of blank transfers of stock, and that such transfers of stock impose upon the holder of them the obligation to pay calls upon the shares while they remain his property."

In *Holbrook vs. The New Jersey Zinc Company*, the court held that a corporation having power to issue a stock certificate in which it affirms that a designated person is entitled to a certain number of shares of stock, thereby holds out to persons who may deal in good faith with the person named in the certificate that he is an owner and has capacity to transfer the shares. This proposition does not rest on any view of the negotiability of stock, but on general principles appertaining to the law of estoppel.<sup>3</sup>

<sup>1</sup> *Bridgeport Bank vs. N. Y. & N. H. R. R. Co.* 30 Conn. 274, 275; *Redfield on Railways*, § 35, and cases cited.

<sup>2</sup> 36 Eng. L. & Eq. 368.

<sup>3</sup> *Supra*.

The recent and well-considered case of the Machinists' National Bank vs. Field<sup>1</sup> establishes with great clearness the status of a *bona fide* purchaser of certificate of stock issued by a corporation in exchange for a forged transfer, both as regards the corporation and the original owner upon whom the forgery was practised. The case presented the following facts: A certificate of shares in the capital stock of a corporation was taken without the owner's knowledge, and, together with a forged power of attorney, delivered to a Broker for sale. The Broker employed an auctioneer, who sold the stock to a purchaser. The Broker then sent the stolen certificate, with the forged power of attorney, to the corporation, requesting a new certificate in the name of the auctioneer. The corporation complied with the request, and a new certificate was sent to the auctioneer, who delivered it to the Broker with a power of attorney, who in turn delivered it to the purchaser, to whom the corporation afterwards issued a new certificate. The Broker, the auctioneer, the purchaser, and the corporation acted in good faith, and supposed the forged power of attorney to be genuine. The forgery being discovered, the original owner brought her bill in equity against the company and against the purchaser, praying that he be ordered to reconvey the shares or surrender her certificate. The court ruled upon this point as follows: "The individual defendant was a purchaser in good faith, for full consideration, without knowledge or notice of the plaintiff's title or of the forgery, and does not hold the certificate which she had. The immediate transfer to him was made by Hawes & Henshaw, who then held a new certificate of stock; and the corporation, upon surrender of that certificate, issued to him another one. His rights against the corporation depend upon the effect of *this certificate*; the plaintiff is clearly entitled to no decree against him."<sup>2</sup>

<sup>1</sup> Machinists' Bank vs. Field, 126 Mass. 345.

<sup>2</sup> Salisbury Mills vs. Townsend, 109 Mass. 115; Lowry vs. Commer-



It will be noticed that the company, in the case supposed, has been in some degree the author of its own misfortune; and the fact that the forgery was skilful and difficult of detection, that the company displayed a commendable diligence in adopting all reasonable precautions to assure itself of the genuineness of the certificate—as notice to the stockholder of record, etc.—are not sufficient grounds for visiting an equally blameless purchaser with the consequences of its mistake in regarding as a verity a transfer which was in fact sham. Justice demands that the company assume all consequential injuries flowing from its mistakes. Its position would not be different from a case in which its authorized agent issues false certificates of stock.<sup>1</sup> In both instances the *bona fide* purchaser of such stock has indisputably a right either to compensation for the fraud to which he has been subjected, or to be admitted as a corporator or stockholder.

3d. *Fraudulent or over issue of stock by corporation.*

We have considered the status of a corporation which has been induced to act upon a forged transfer with regard to three classes of persons: (1.) The original and rightful owner. (2.) The person who derives title under the forged power of transfer. (3.) The purchaser of a genuine certificate issued by the corporation in exchange for a forged certificate. It now remains to notice the liabilities of a corporation in cases of a fraudulent or over issue of stock by its directors or authorized agents. It is manifest that stock thus illegally created can never become part of the capital of the corporation. In the words of Davis, J., in the Schuyler case,<sup>2</sup> “a corporation with a fixed capital divided into a fixed number of shares can have no power of its own volition, or by any act of its officers

cial Bank, Taney (C. C.), 310; Bank vs. Lanier, 11 Wall. 369; In re Bahia & San Francisco R. R. Co. L. R. 3 Q. B. 584. <sup>1</sup> N. Y. & New Haven R. R. Co. vs. Schuyler, 34 N. Y. 30. <sup>2</sup> Id.

or agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove, or consent to the removal of, restrictions which are part of the fundamental law of the corporate being; and hence every attempt of the corporation to exert such a power before it is conferred, by any direct and express action of its officers, is void; and hence every indirect and fraudulent attempt to do so is void. For if such a result cannot be accomplished directly by the whole machinery of the corporate powers, it is absurd to suppose that it can be produced by the covert or fraudulent efforts of one or more of the agents of the corporation." But in this case the court considered the liability of a corporation for the consequences of its wrongful acts, however foreign to its nature *or beyond its granted powers* the wrongful transaction or act may be, as so distinctly settled by authority, and so clear upon principle, as to bear no more than mere enunciation.<sup>1</sup>

Where the transfer agent of the defendant's corporation was authorized to sign and issue certificates of stock on a transfer from one shareholder to another upon the books and on the surrender of the previous certificates, and the agent, for his own purposes, signed and issued certificates in form precisely similar to those genuine and authorized, and, trusting to their false appearance, the plaintiffs took one of them by transfer and advanced money upon it, held, that the acts of the agent were not within the *real* or *apparent* scope of the power delegated to him. And in the first stages of the litigation relating to the over-issue of the stock of the New York and New Haven Railroad Company by its president and trans-

<sup>1</sup> Lamm vs. Port Deposit Home- Bissell vs. Michigan S. & N. I. R. Co.  
stead Assoc. 49 Md. 233; Goodspeed 22 N. Y. 305-309, per Selden, J.  
vs. East Haddam Bank, 22 Conn. 541;

fer agent, Schuyler, the evidence went to establish that his agency was limited to an issue of certificates where there was a transfer of shares on the company's books accompanied by a surrender of the certificate of the previous owner. On this state of facts the court held that the corporation was not liable for the acts of its agent.<sup>1</sup>

But it appeared, in the later case of the New York and New Haven Railroad Company vs. Schuyler,<sup>2</sup> that, in addition to the power just stated, Schuyler's agency extended to the power of issuing certificates in precisely the same form to the original subscribers for the stock; that he had authority to dispose of the stock not taken by the original subscribers, and issue certificates in the same form to purchasers; that he had authority to dispose of certain forfeited shares, and in such case issue like certificates; that to him was intrusted the keeping of all the stock accounts of the company, and that these books were kept closed to dealers. These facts threw the responsibility of the agent's acts upon the corporation, in obedience to the principle before alluded to.

The reasoning and result of the Schuyler case was fully confirmed in the opinion of Hare, C. J., in the case of Willis vs. Philadelphia Railroad Company.<sup>3</sup> It had been contended, upon the argument, that as neither the vote of the directors nor stockholders, nor both conjoined, could authorize an issue of stock in excess of the number the company's charter allowed, so as to bind the company to that which the company was powerless to perform, the agent could acquire no power through fraud which the principal did not possess and could not have conferred. The court, in passing upon this point, said: "This argument might be unanswerable if the power to

<sup>1</sup> Henning vs. N. Y. & New Haven etc. Bank vs. Drovers' Bank, 16 id. R. R. Co. 9 Bosw. 283; Mechanics' 125, 150.  
Bank vs. N. Y. & New Haven R. R. <sup>2</sup> 34 N. Y. 30.  
Co. 13 N. Y. 599; see also Farmers' <sup>3</sup> 6 Week. Notes Cas. 461.

give certificates was identical with the power to create stock, or if a certificate could not be legitimately issued to any one who claimed under a derivative title, because it would then be incumbent on third persons to take notice of the limited power and ascertain whether it had been strictly pursued. It is, however, plain that the Legislature did not intend to impose a rule contrary to the ordinary course of business, and which would have impaired the market value of the stock. Although the company could not issue a larger number of shares than that prescribed by its charter, it might well give a new certificate to a purchaser in lieu of that surrendered by the vendor, and repeat the act as often as occasion required. . . . That which a corporation is not authorized to do under any circumstances, or which is absolutely forbidden by its charter, is so entirely void that nothing short of an act of Assembly can render it valid; but that which it may do for certain purposes and not for others, or on the happening of a particular event, is not necessarily within this rule, and may take effect although the prerequisites were not fulfilled."

In *Tome vs. Parkersburgh R. R. Co.*,<sup>1</sup> the treasurer of the company was intrusted with the custody of the books relating to ownership and transfer of stock, and it was his duty to prepare and countersign all certificates of stock and scrip. He fraudulently issued certificates of stock for his private purposes, and the company was held liable for his acts to the purchasers of the spurious certificates.<sup>2</sup>

A stockholder, whose stock has been sold without his knowledge, under a forged power of attorney, may sustain an action for money had and received against the *innocent partners* of the forger who received the proceeds of the sale.<sup>3</sup>

<sup>1</sup> 39 Md. 36.

<sup>3</sup> *Marsh vs. Keating*, 1 Bing. N. C.

<sup>2</sup> And see *Madison etc. R. R. Co.* 198.  
*vs. Norwich Sav. Soc.* 24 Ind. 457.

## VI. Dividends.

## (a.) General Rules as to Dividends.

Before a dividend is declared, all the property of the corporation belongs, in fact, jointly to all the stockholders, the legal title being in the corporate body, and its affairs managed by the directors as trustees for the stockholders. After a dividend is declared, each stockholder has a right in severalty to his particular proportion, and this right cannot be abridged by any discrimination.<sup>1</sup>

We have already stated<sup>2</sup> that, as a general rule, the stockholders of a corporation cannot compel the directors or trustees of a corporation to declare dividends. The directors have a discretion in this respect which the courts will not interfere with, unless its non-exercise is attended with circumstances which will result in gross and manifest wrong to the stockholders.<sup>3</sup>

Nor can the stockholder interfere to prevent a proper dividend;<sup>4</sup> nor, if the directors have power to increase the capital of the company, can a stockholder prevent them, by injunction, from issuing new stock in lieu of a dividend.<sup>5</sup> Where spurious stock, however, has been issued, a stockholder may enjoin the payment of a dividend until it is established who are the genuine stockholders.<sup>6</sup> Nor will a corporation be en-

<sup>1</sup> Boardman vs. L. S. & M. S. R. Co. 84 N. Y. 157; King vs. Paterson etc. R. R. Co. 29 N. J. L. 82; City of Ohio vs. Cleveland etc. R. R. Co. 6 Ohio St. 489; Carpenter vs. N. Y. etc. R. R. Co. 5 Ab. (N. Y.) Pr. 276; Granger vs. Bassett, 98 Mass. 462. <sup>2</sup> Ante, p. 594.

<sup>3</sup> Karnes vs. Rochester etc. R. R. Co. 4 Ab. (n. s.) 107; Boardman vs. L. S. & M. S. R. Co. 84 N. Y. 157; Pratt vs. Pratt, 33 Conn. 446; Luling vs. Atlantic Ins. Co. 45 Barb. 510, 50 Barb. 520, aff'd 51 N. Y. 207; State

vs. Bank, 6 La. 745; Ely vs. Sprague, Clarke Ch. 351; Green's Brice's Ultra Vires (2d ed.), 202 et seq.; Pierce on Railroads, 122.

<sup>4</sup> Carpenter vs. N. Y. & New Haven R. R. Co. 5 Ab. (N. Y.) Pr. 277.

<sup>5</sup> Howell vs. Chicago etc. R. R. Co. 51 Barb. 358, 378. As to dividends being paid in money or stock, see Brundage vs. Brundage, 60 N. Y. 544; Green's Brice's Ultra Vires (2d ed.), 199.

<sup>6</sup> Underwood vs. N. Y. & New Haven R. R. Co. 17 How. (N. Y.) Pr. 537.

joined from declaring a dividend in a State where it has neither officers nor a place of business.<sup>1</sup>

So where dividends have been improperly declared and paid, they may be recovered back. The assets of a corporation cannot be divided among its stockholders, in the shape of dividends or in any other form, to the prejudice, detriment, or postponement of creditors. The property or assets of a corporation constitute a trust fund for the payment of its debts, and a judgment creditor, after the return of an execution unsatisfied, may maintain an action in the nature of a creditor's bill against a stockholder to reach property or assets of the corporation so received by him. And it is equally immaterial whether he got it by fair agreement with his associates or by any wrongful act.

These views were laid down by the Commission of Appeals of the State of New York in the case of *Bartlett vs. Drew*.<sup>2</sup> The court said: "It was found that the defendant D. had a large amount of the assets in his possession, which belonged to the corporation when the plaintiff's demand accrued, and some portion of which should have been applied in discharge of its obligation to the plaintiff; . . . it was so much of the assets of the corporation as ought to be devoted to the payment of the debts of the company, and his claim as a stockholder could not prevail over the creditors' prior right."<sup>3</sup>

### (b.) *Effect of Declaration of Dividend.*

But the questions with which we are most concerned are those which arise subsequently to the declaration of a divi-

<sup>1</sup> *Williston vs. Michigan Southern* App. 104. Consult also *Sawyer vs. & N. I. R. R. Co.* 95 Mass. 400. Consult also *Prouty vs. Same*, 1 Hun, 655, 52 N. Y. 363; *Howell vs. Chicago & N. W. R. R. Co.* 51 Barb. 378; *Chase vs. Vanderbilt*, 5 J. & S. (N. Y.) 334; 62 N. Y. 307.

<sup>2</sup> 57 N. Y. 587.

<sup>3</sup> See also *Rance's Case*, L. R. 6 Ch. Page, 17 B. Mon. 412.

*Hoag*, 17 Wall. 610; *Curran vs. State*, 15 How. (U. S.) 304; *Osgood vs. Laytin*, 3 Keyes (N. Y.), 521; *Gratz vs. Redd*, 4 B. Mon. 178; *Stoddard vs. Shetucket Foundry Co.* 34 Coun. 542; *Lexington etc. Ins. Co. vs.*

dend, in contests either between stockholders and the corporation, or the stockholders and third persons, respecting their several rights to the money or scrip declared by the corporation. And under this head it may be stated, as an undisputed proposition, that when a dividend has been declared by a corporation it becomes the individual property of the stockholder, for which, when the time elapses for its payment, a suit may be maintained by the stockholder or his legal representative.<sup>1</sup>

The theory of these cases, permitting a stockholder to maintain an action against the corporation for a dividend, is this: When a dividend is declared it becomes a debt, like any other debt, irrespective of the time of payment; and the relation of debtor and creditor is established between the stockholder and the corporation instantly upon the declaration. And some of the cases have advanced the doctrine that, when a dividend has been declared, it becomes a *trust fund* for the stockholder, and cannot be appropriated for any other purpose to the prejudice of the stockholder entitled to the

<sup>1</sup> The English cases are as follows: *L. S. R. R. Co.* 84 N. Y. 157; *Hughes Fawcett vs. Laurie*, 1 Dr. & Sm. 192; *Stevens vs. South Devon Ry. Co.* 9 Hare, 313; *Dalton vs. Midland Ry. Co.* 13 C. B. 474; and each stockholder must bring his own action, *Carlisle vs. Southeastern Ry. Co.* 2 H. & T. 366; 19 L. J. (Ch.) 477; *Morgan vs. Great Eastern Ry. Co.* 1 H. & M. 560. The New York cases: *Le Roy vs. Globe Ins. Co.* 2 Edw. Ch. 657; *Kane vs. Bloodgood*, 7 Johns. Ch. 90; *Brundage vs. Brundage*, 60 N. Y. 544; *Carpenter vs. New York etc. R. R. Co.* 5 Ab. (N. Y.) Pr. 277; *Chase vs. Vanderbilt*, 5 (J. & S. N. Y.) 334; *Ehle vs. Chittenango Bank*, 24 N. Y. 548; *Jones vs. Terre Haute R. R. Co.* 29 Barb. 353; 57 id. 196; *Hyatt vs. Allen*, 56 id. 553; *Boardman vs. Michigan Southern & L. S. R. R. Co.* 84 N. Y. 157; *Hughes vs. Vermont Copper Mining Co.* 72 id. 207. Pennsylvania cases: *Brown vs. Coal & Nav. Co.* 49 Pa. St. 270; *R. R. Co. vs. Cowell*, 28 id. 329; *Westchester & P. R. R. Co. vs. Jackson*, 77 id. 321. Other States: *Marine Bank vs. Biays*, 4 H. & J. 338; *Granger vs. Bassett*, 98 Mass. 462; *Stoddard vs. Shetucket Foundry Co.* 34 Conn. 542; *King vs. Paterson R. R. Co.* 29 N. J. L. 82; s. c. id. 504; *Jackson vs. Plank Road Co.* 31 id. 277; *Lockhart vs. Van Alstyne*, 31 Mich. 78; *City of Ohio vs. R. R. Co.* 6 Ohio St. 489; *State vs. Baltimore etc. R. R. Co.* 6 Gill, 363; *Burroughs vs. N. C. R. R. Co.* 67 N. C. 376; *Kepel vs. Petersburg R. R. Co.* Chase, 167.

same. This view was laid down in *Le Roy vs. Globe Ins. Co.*<sup>1</sup> In that case the directors of an insurance company declared a dividend on the 10th of November, 1836, and on the thirtieth day of the same month the dividend was carried on the books of the company to the profit-and-loss account, leaving the capital intact with a surplus. Public notice was given that the dividend was payable on and after the 18th of December, and checks were prepared for each person's dividend. These checks were placed in the hands of the secretary, with directions to deliver them to the stockholders, and about four fifths of the checks had been called for, when the great fire in New York rendered the company insolvent. In an action by a stockholder against the receiver, the court held that the dividend had been severed, and the former was entitled to it; that the money should be regarded as a trust fund, to which the stockholders had vested rights—not in their corporate capacity, but as individuals to whom the money legally and equitably belonged. “Having acquired this right as between them and the corporation, the assignment or transfer to the receiver could not take it away.”<sup>2</sup>

And in certain cases the person entitled to a dividend may follow the money and compel its appropriation to the payment of the same. In September, 1873, the Erie Railway declared a dividend of one per cent. upon its stock, and deposited the money to pay the same with D., S., & Co. On December 10, 1874, the money then remaining with the said firm was withdrawn by the company, and subsequently passed, with its other property, to a receiver of the road. An application was made by the petitioner, who, at the time the dividend was declared, was a stockholder of the said road, to compel the receiver to pay him the amount of his

<sup>1</sup> 2 Edw. Ch. 657.

<sup>2</sup> See also *Lowne vs. The American Fire Ins. Co.* 6 Paige Ch. 484.



dividend. The court held that the fund deposited with D., S., & Co. should be regarded as specifically appropriated for the payment of the dividend, and that the stockholders acquired in equity a lien upon such fund to the extent of the amount to which they were respectively entitled, and that such lien followed the fund in the hands of the receiver; that a stockholder might apply on petition for such dividend, and was not obliged to bring an action therefor.<sup>1</sup> And in an action against the corporation for a dividend declared and payable, the company is estopped from setting up that the dividend has not been earned, and that its payment would cause the withdrawal of part of its capital.<sup>2</sup> But a corporation may retain dividends as pledges for debts due to it from its stockholders.<sup>3</sup>

In respect to the proper form of action against a corporation to recover a dividend declared, it has been decided that mandamus is not a proper remedy.<sup>4</sup> Where a stockholder receives from a corporation dividends declared, and admitted by it to be due to him, on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received the proportion of the dividends so received which plaintiff would have been entitled to, had his shares participated. It seems that the remedy of one thus wrongfully excluded from the

<sup>1</sup> *In re Le Blanc*, 14 Hun, 8, aff'd 75 N. Y. 598. Consult also, in this connection, *Beers vs. Bridgeport Spring Co.* 42 Conn. 17; and *Curry vs. Woodward*, 44 Ala. 305, where it is said that unpaid dividends are assets, and, being such, are liable for the debts of the corporation.

<sup>2</sup> *Stoddard vs. Shetucket Foundry Co.* 34 Conn. 542.

<sup>3</sup> *Hagar vs. Union Nat. Bank*, 63 Me. 509; *Sargent vs. Franklin Ins. Co.* 25 Mass. 90; *Bates vs. N. Y. Ins. Co.* 3 Johns. Cas. 238.

<sup>4</sup> *People vs. Central Car etc. Co.* 41 Mich. 166. But see *Le Roy vs. Globe Ins. Co.* 2 Edw. Ch. 657; and consult also *In re Le Blanc*, 14 Hun, 8, aff'd 75 N. Y. 598.

rights of a stockholder is against the company. He cannot follow the assets of the company in the hands of parties to whom it has paid them, until at least he has established his rights as a creditor of the company and has exhausted his legal remedies against it.<sup>1</sup>

Before a stockholder can maintain an action against the corporation for a dividend, he must make a demand against the company;<sup>2</sup> but a mere letter of inquiry is not sufficient,<sup>3</sup> nor can there be a sufficient demand while the shares are under attachment by the corporation.<sup>4</sup> The Statute of Limitations, however, will not run until such demand and refusal.<sup>5</sup> And in the case of *Hughes vs. Vermont Copper Mining Co.*<sup>6</sup> the Court of Appeals of New York held that after a stockholder had elected to treat his shares as converted by the corporation, and brought an action against it for such conversion, he cannot during the pendency of that action sue for dividends.

When, however, a corporation declares a dividend, as a general rule it must be payable to all of its stockholders alike, and the directors cannot discriminate between them unless such power of discrimination is conferred by the charter of the company.<sup>7</sup>

The case of *Jones vs. Terre Haute Railroad Co.*<sup>8</sup> will sufficiently illustrate this proposition. In that case, the plaintiff, holding bonds of the defendant by their terms convertible into cash, surrendered them, and received stock issued prior

<sup>1</sup> *Peckham vs. Van Wagener*, 83 N. Y. 40; 13 J. & S. 328.

<sup>2</sup> *Scott vs. Central R. R. Co.* 52 Barb. 45.

<sup>3</sup> *Id.*

<sup>4</sup> *Hagar vs. Union Nat. Bank*, 63 Me. 509.

<sup>5</sup> *Phila. & C. R. R. Co. vs. Cowell*, 28 Pa. St. 329; *Kane vs. Bloodgood*,

7 Johns. Ch. 89.

<sup>6</sup> 72 N. Y. 207.

<sup>7</sup> *Jones vs. Terre Haute R. R. Co.* 29 Barb. 353; 57 N. Y. 196; *Luling vs. Atlantic Ins. Co.* 45 Barb. 510, aff'd 51 N. Y. 207; *Atlantic etc. Telegraph Co. vs. Commonwealth*, 3 Brews. (Pa.) 366; *State vs. Baltimore etc. R. R. Co.* 6 Gill, 363; *Ryder vs. Alton etc. R. R. Co.* 13 Ill. 516.

<sup>8</sup> *Supra.*

to the declaration of a dividend by the board of directors. The court held that the directors had no right to limit the payment of the dividend to the stockholders holding stock at a day prior to the issue of the stock to the plaintiff—viz., to those persons holding stock at the close of the fiscal year of the company. In denying the right of the directors to affect plaintiff's title to dividends by their adopting a particular day as the close of the corporate fiscal year, or special days for declaring dividends, or directing the close of the company's books, the court said: "The circumstance that the directors have adopted some particular day as the close of the corporate fiscal year, or that special days are adopted for declaring dividends, or that it is found convenient to close the transfer-books for any purpose, does not in any way impair the legal rights of a stockholder to share in dividends subsequently declared, although the closing of the books would to some extent embarrass the transfer of stock. . . . After a dividend is declared, each stockholder has a right in severalty to his particular proportion; and this right cannot, I think, be abridged by any discrimination of the directors in any form."<sup>1</sup>

(c.) *Dividends when Declared Belong to the Registered Owners.*

There have been numerous contests between the registered owners of stocks and persons becoming stockholders subsequently to the declaration of a dividend respecting the rights to the latter.

In those cases where a person was the registered owner of the stock at the time of the declaration and payment of the dividend, the authorities seem to be unanimous in awarding

<sup>1</sup> As to how far the usage of the Stock Exchange may affect a right to dividends, see *Hill vs. Newichawanick Co.* 8 Hun, 459, aff'd 71 N. Y. 593; Chap. on Usage, pp. 368, 369.

it to such owner, though he may have parted with his stock before collecting the dividend from the corporation.<sup>1</sup>

The same rule applies where the owner parts with his stock after the declaration of the dividend, but before the time designated for its payment has arrived. In such case, the dividend clearly belongs to the registered owner of the stock at the time of its declaration,<sup>2</sup> although there are a few cases against this view.<sup>3</sup> Dividends, when declared by a corporation, do not pass upon an ordinary transfer of the stocks, but they remain the property of the transferror in the absence of special agreement. And this is the settled rule both of this country and England. The reason is that when a dividend is declared it becomes a debt due from the corporation to the stockholder, who is *quoad hoc* a creditor of the company; accordingly, as an assignment of shares of a corporation merely transfers a proportionate part of the capital, or assets and property, a dividend, which is a debt due from the corporation to a stockholder, does not and cannot pass with an ordinary transfer of the shares.

There are many cases which illustrate this proposition; but the case of *Hill vs. Newichawanick Co.*<sup>4</sup> most strikingly and forcibly presents the prevailing doctrine of the courts.

And on a stock contract for the sale of shares deliverable at a future time, the purchaser is entitled to dividends accruing between the sale and the delivery; and the purchaser's rights

<sup>1</sup> *Spear vs. Hart*, 3 Robt. (N. Y.) C. C. 347; *March vs. Eastern R. R.* 420; *Lombardo vs. Case*, 45 Barb. Co. 43 N. H. 515.

95; 30 How. (N. Y.) Pr. 117; *Hyatt vs. Allen*, 56 N. Y. 553; *People vs. Assessors*, 76 id. 202; *Hill vs. Newichawanick Co.* *supra*; *Brundage vs. Allen*, 1 N. Y. Sup. Ct. (T. & C.) 82; *Manning vs. Quicksilver Mining Co.* 24 Hun, 360; *Boardman vs. L. S. & M. S. R. R. Co.* 84 N. Y. 157.

<sup>3</sup> *Burroughs vs. North Carolina R. R. Co.* 67 N. C. 376.

<sup>4</sup> 48 How. (N. Y.) Pr. 427; 8 Hun, 459, *aff'd* 71 N. Y. 593.

are the same, whether the seller at the time of making the contract had the shares on hand or not.<sup>1</sup>

And, as we have seen,<sup>2</sup> the courts in the State of New York have refused to allow this well-settled principle of law to be controlled or set aside by the usage of Brokers, although, in the case which we have just alluded to,<sup>3</sup> Mr. Chief-justice Davis intimated that such a usage might avail in a proper case. But since then the Superior Court, General Term, of New York has again pronounced against that view.<sup>4</sup> The last-mentioned case was an action upon a contract known as a "put" in stock operations, allowing bearer to deliver certain stocks to defendant at a specified price within a specified period, as follows:

"NEW YORK, May 23, 1878.

"For value received, the bearer may deliver me on one day's notice, except last day, when notice is not required, 500 shares of the common stock of the Chicago & Northwestern R. R. Co., at 49 per cent.; any time in thirty days from date. The undersigned is entitled to all the dividends or extra dividends declared during the time. Expires—13—four o'clock P. M. R. S."

The controversy arose out of a dispute as to who was entitled to a dividend of 3 per cent. which was declared on the 16th of May, before the contract existed, and was payable on the 27th of June, after it had expired. The court held that the contract was plain, and that evidence offered and admitted by a referee, under exception, for the purpose of explaining or varying the import and legal effect of the written instrument, on the ground of custom or usage among a class of dealers, was improperly allowed; that the only dividends the defendant was entitled to claim under the clause in the con-

<sup>1</sup> Currie vs. White, 45 N. Y. 822. To same effect, Black vs. Homersham, 39 L. T. R. (n. s.) 671. See Hyatt vs. Allen, 56 N. Y. 553.

<sup>2</sup> Chap. on Usages, pp. 368, 369.

<sup>3</sup> Hill vs. Newichawanick Co. supra.

<sup>4</sup> Hopper vs. Sage, 12 N. Y. *Week. Dig.* 78.

tract were such as were declared during the time of thirty days which was the limit of the privilege; that, under a contract to sell shares of stock, the dividend payable after the day for the delivery of the stocks does not pass with the stocks. Dividends are not an incident to stocks so as to pass with them; they belong to the corporation, and are divided among the shareholders, and may be sold or assigned without parting with the stocks. They are not earned, like interest, by money represented in the stock. The custom or usage received by the court below was therefore improperly admitted as against the settled rules of law. So under a sale of stock paying, therefore, par value, with a *pro rata* proportion of an anticipated dividend, the buyer can recover back the portion of the price paid upon the anticipation of the dividend, upon the event proving that no dividend had been earned.<sup>1</sup>

So where a contract in writing was made for the sale of certain stock, and all the "right, title, and interest" of the holder therein; and on the following day an assignment was made by the seller, and accepted by the buyer as a full performance of the contract, and this assignment transferred the stock "and all future benefits and dividends thereof," it was held that the title to a dividend declared prior to the sale, but not drawn by the seller, did not pass.<sup>2</sup>

The subject of the liability of a corporation for dividends to the owner of stock not appearing on its books was recently considered by the General Term of the Supreme Court in New York.<sup>3</sup> In that case, the corporation issued a certificate to one B. for ten shares of stock, containing the usual statement that such stock was transferable only on the books

<sup>1</sup> Riggs vs. Tayloe, 2 Cranch C. Ct. 687.

<sup>2</sup> Harper vs. Raymond, 3 Bosw. 29; s. c. 7 Ab. (N. Y.) Pr. 142.

<sup>3</sup> Brisbane vs. Del., Lack., & W. R. R. Co. (N. Y. Sup. Ct., Gen. Term, First Dept.) N. Y. *Daily Reg.* Nov. 30, 1881.

of the company upon surrender of the certificate. On the 1st of January, 1856, B. executed a power of attorney endorsed on the certificate, appointing the plaintiff his attorney irrevocable to sell and transfer the stock; but no transfer was made upon the books of the company until after the death of B., in 1876. In the intermediate time, stock and cash dividends had been declared, and credited upon the books of the company to B., who appeared as the owner of the stock, and they were paid over to the administrator of B., without any notice of the plaintiff's rights in the premises. Whereupon the plaintiff brought suit to recover these dividends from the company; but the court held that the action could not be maintained. The court, per Daniels, J., said: "As long as the books of the company contain evidence that the person who received the certificate was still to be regarded as the owner of the shares, it had an authentic record upon which it could lawfully act; and that determines the disposition which should be made of the dividends."<sup>1</sup> B. stood upon the books of the company as owner of the shares; nothing appeared to impeach his title, and as they were only transferable upon the surrender of the certificate, as long as that had not been done no other alternative existed than to regard him as still the owner of the shares. To obtain the dividends upon the shares he was not bound to produce the certificate which had been issued for the stock, but he could do so upon the fact of his recorded title, as long as no evidence appeared from which his rights could be impeached or questioned. Payment to him under such circumstances

<sup>1</sup> Similar reasoning was adopted and a like result reached in the case of *Cleveland etc. Railroad Co. vs. Robbins*, 35 Ohio St. 483. See also *Bank of Commerce's Appeal*, 73 Pa. St. 59, holding that, as between a corporator and the corporation, the records of the corporation or its stock-book are the evidence of their relation. Meetings of the stockholders, elections, dividends, etc., are regulated by this record.

would be a lawful and proper disposition of the dividends.”<sup>1</sup>

But there may arise cases where the company would not be justified in adopting this well-known practice, although these instances will necessarily be of rare occurrence; for the corporation may possess such direct and positive notice that the stock is improperly registered in the name of one not the owner as to render it liable to the true owner if it should pay the dividend in face of such knowledge. The question would then resolve itself into one of payment of money or delivery of property to one possessing the *indicia* of title or ownership, but known not to be such owner by the party paying the money or delivering the property;<sup>2</sup> and the true owner of the stock, it would seem, could apply to the courts to prevent the payment to the nominal and registered owner of the dividend or interest accruing on the same.

There is another class of cases in respect to ownership of dividends—viz., in contests between persons claiming under wills or deeds of settlement, and as these controversies have all depended upon the particular language used, or have been determined upon the principles heretofore alluded to, we content ourselves with merely citing them in the notes.<sup>3</sup>

<sup>1</sup> The court cited to sustain these views, *Smith vs. American Coal Co.* 7 Lans. (N. Y.) 317; *McNeil vs. Tenth Nat. Bank*, 46 N. Y. 325; *Manning vs. Quicksilver Mining Co.* 24 Hun (N. Y.), 360. See also *Cleveland & Mah. R. R. Co. vs. Tappett*, Supr. Ct. Ohio, 1 Am. Law Rev. (n. s.) 396, where the same conclusion was reached.

<sup>2</sup> Consult, in this connection, *N. Y. & New Haven R. R. Co. vs. Schuyler*, 34 N. Y. 30, 81, 82; *Bridgeport Bank vs. N. Y. & New Haven R. R. Co.* 30 Conn. 270.

<sup>3</sup> *Brundage vs. Brundage*, 60 N. Y. 544; *Bates vs. Mackinley*, 31 Beav.

280; *Jones vs. Ogle*, L. R. 8 Ch. 192; 42 L. J. Ch. 334; 21 W. R. 239, aff'g 14 L. R. Eq. 419; *Donaldson vs. Donaldson*, 10 L. R. Eq. 635; 23 L. T. (n. s.) 550; *In re Hopkins*, 18 L. R. Eq. 696; 30 L. T. (n. s.) 627; *Pollock vs. Pollock*, 18 L. R. Eq. 329; 44 L. J. Ch. 168. See also as to apportionability of dividends, *Hartley vs. Allen*, 4 Jur. (n. s.) 500; 27 L. J. Ch. 621; *In re Maxwell*, 1 Hem. & M. 610; *Wardroper vs. Cutfield*, 10 Jur. (u. s.) 194; 33 L. J. Ch. 605; *Donaldson vs. Donaldson*, supra; *Pollock vs. Pollock*, supra.



*VII. Pledges of Stock Certificates.*

We have already examined at considerable length in the third chapter of this work<sup>1</sup> the relation which a Stock-broker bears to his Client, and the rights and duties of the former over stock certificates which he may be carrying for his Client. The law of pledges is a distinct and voluminous subject, which has already been separately treated of by several authors; and it is no part of this work to go over the same ground, except so far as Stock-brokers are directly concerned in the cases, or where they seem to bear directly on that business.

But we may summarize the law upon the subject of pledges of stock certificates as follows:

1st. It is well settled now that certificates of stock may be pledged or delivered as collateral security for loans; though this was formerly doubted, because in order to constitute a pledge there must be an actual delivery of the thing pledged to the pledgee,<sup>2</sup> and there can be no transfer of possession of shares in a corporation except by a written transfer. The doctrine formerly was that the written transfer of stock by way of security passed indeed the legal title thereof, and thus the transferee assumed the relation of mortgagee to the equitable owner, but that by such transfer the transferee did not acquire the special property therein, together with possession, which constituted him a pledgee.

These were the pretensions of counsel in the well-considered case of *Wilson vs. Little*,<sup>3</sup> and it was there decided and finally settled in the State of New York that there was no reason in law why stock could not be pledged. It was, indeed, fully recognized that possession must uniformly accompany a pledge, and that the transfer of the legal title was

<sup>1</sup> Pp. 101, 141 et seq.

<sup>2</sup> 2 N. Y. 443.

<sup>3</sup> *Casey vs. Cavaroc*, 96 U. S. 467.

necessary to a change of possession, because there could be no manual delivery of the stock; but it was held that there was nothing in these facts inconsistent with the nature of a pledge, and that it was sufficient to constitute a pledge of stock that its certificate should be put by a written transfer within the power of the pledgee, so as to be made available to him for the satisfaction of his debt.<sup>1</sup>

For the sake of perspicuity, it is not irrelevant to notice here the well-settled distinction between a mortgage and pledge of stocks, to which a passing allusion has already been made. A mortgage is a sale of the stock by way of securing a debt, with a condition that if the mortgagor pays the debt the sale shall be void; a pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter the title remains in the pledgor, although possession is given to the pledgee.<sup>2</sup>

In a leading Massachusetts case on this subject<sup>3</sup> the distinction was thus expressed: "If regarded as a pledge, it is more in the nature of a trust than if regarded as a mortgage. The principal reason assigned for not regarding a mortgage as strictly a trust is that the mortgagee has a property in the thing which he may make absolute, in case the condition is not performed, by foreclosing the right of redemption. But the pledgee cannot do this. If the debt or duty is not discharged, he must avail himself of the security by selling the thing pledged, and not by foreclosure; and he holds the avails

<sup>1</sup> But the validity of the pledge of stock was sustained in the State of New York as early as *Nourse vs. Prime*, 4 Johns. Ch. 490 (1820). See also *Dykens vs. Allen*, 3 Hill, 593; s. c. 7 id. 497; *Vaupell vs. Woodward*, 2 Sandf. Ch. 143; *Romaine vs. Van Allen*, 26 N. Y. 309; and in Massachusetts, *Fay vs. Gray*, 124 Mass. 500;

*Fowle vs. Ward*, 113 id. 548; *Fisher vs. Brown*, 104 id. 259; *Day vs. Holmes*, 103 id. 306.

<sup>2</sup> *Lewis vs. Graham*, 4 Ab. (N. Y.) Pr. 106, 109; *Brownell vs. Hawkins*, 4 Barb. 491; and see *Ceas vs. Bramley*, 18 Hun, 187; *Union Trust Co. vs. Rigdon*, 93 Ill. 458.

<sup>3</sup> *Newton vs. Fay*, 92 Mass. 505.

of the sale in trust to discharge the debt or duty, and, if any balance remains, to pay it to the pledgor."

Probably some confusion and difficulty have arisen in distinguishing a pledge of stock from the mortgage of it, from the fact that a change of possession of stock, from its incorporeal nature, can be effected only by a written transfer which in form passes the legal title, and in this respect assimilates it to a mortgage. In general, whenever there is a transfer of stock as collateral security, unless it is in form a mortgage—that is, with a clause of defeasance—the presumption is a fair one that it is intended for a pledge and not for a mortgage; that the owner does not intend to part with the title so long as he has the right to its restoration, unless he does so in express terms.<sup>1</sup> And the instrument evidencing the pledge may be in the form of an absolute transfer, leaving the purpose and consideration of the transfer, and its true nature as a pledge, to be proved by parol.<sup>2</sup> Where stock has been actually sold and transferred in payment of a debt, and the transaction has become executed and complete, its character cannot be changed by subsequently according a right to redeem it; but even in such a case it seems that the transaction is to be viewed in the light of surrounding circumstances, and parol evidence admitted to show its true nature.<sup>3</sup> If, however, the owner of stock pledges it by an instrument in the form of an absolute transfer, he does so, as we have seen, at his own risk; for he thereby invests the pledgee with the apparent ownership of the stock, and puts it in his power to pass a title to a *bona fide* purchaser which will be paramount to his own.<sup>4</sup> But a

<sup>1</sup> *Mechanics' Building Assoc. vs. Merchants' Bank vs. Cook*, 21 Mass. Conover, 14 N. J. Eq. 219; and see 405.

*Wilson vs. Little*, 2 N. Y. 443; *Hasbrouck vs. Vandervoort*, 4 Sandf. 88.

*596; Brewster vs. Hartley*, 37 Cal. 15.

<sup>2</sup> *Newton vs. Fay*, 92 Mass. 505; *Cotton Co. L. R.* 17 Eq. 273; *Talty*

<sup>3</sup> *Lauman's Appeal*, 68 Pa. St.

<sup>4</sup> *Ex parte Sargent, in re Tahiti*

loan in bonds instead of money has been held not to be a sale.<sup>1</sup>

2d. A pledge is perfected by the delivery of the certificate to the pledgee, with a power in blank to transfer.

Stock, being incorporeal in its nature, is not capable of manual delivery, and the mere delivery of its certificate does not transfer the stock—that is, does not pass the legal title.<sup>2</sup> But mere delivery of the certificate, it seems, does convey to the pledgee an equitable interest in the stock which a court of equity will protect by decreeing a sale of the stock for his benefit.<sup>3</sup> The ordinary form of transfer by which a pledge of stock is effected both in this country and in England is by delivering to the pledgee of the certificate of stock with written transfer of the same, which is usually endorsed on the certificate, and a power of attorney authorizing a transfer of the stock on the books of the corporation. Very often these transfers and powers of attorney are executed in blank, leaving the pledgee to fill in his own name.<sup>4</sup> The pledge is often effected by a written transfer, endorsed on the certificate or otherwise, but absolute in its form and without any note or memorandum indicating the pledge,<sup>5</sup> leaving the true nature and consideration of the transaction to be established by parol, as it may be.<sup>6</sup> It is a better practice, and one necessary for the protection of the pledgor, for him to take from the pledgee a receipt or memorandum showing the precise nature of the transaction;<sup>7</sup> but

vs. Freedman etc. Trust Co. 93 U. S. 321; and see cases cited at p. 599 et seq. Ex parte Sargent, L. R. 17 Eq. 273. And this method of pledging stock is effectual and lawful unless the act of incorporation or articles of association require a deed (id.).

<sup>1</sup> Quackenbos vs. Sayer, 4 Sup. Ct. (T. & C.) 424.

<sup>2</sup> See Merchants' Bank vs. Livingston, 74 N. Y. 223; Wilson vs. Little, 2 id. 443.

<sup>3</sup> Johnson vs. Dexter, 2 MacArth. 530.

<sup>4</sup> Ogden vs. Lathrop, 65 N. Y. 153; 158.

<sup>5</sup> McNeil vs. Tenth Nat. Bank, 46 N. Y. 325; Merchants' Bank vs. Livingston, 74 id. 223.

<sup>6</sup> Newton vs. Fay, 92 Mass. 505.

<sup>7</sup> Ogden vs. Lathrop, 65 N. Y.

even this, as we have seen, would not afford the pledgor adequate protection as against the equities of third persons, unless incorporated with or so referred to in the written transfer of the stock as to give notice of the pledge to all who should deal with the stock. The simple insertion of the word *pledgee* in the transfer, after the name of the transferee, would give such notice of the pledge as to protect the pledgor even as against third persons.<sup>1</sup>

Though the things pledged may be in the temporary possession of the pledgor as special bailee without defeating the legal possession of the pledgee, yet possession by the pledgee is of the essence of a pledge both at common and civil law;<sup>2</sup> and where the thing pledged has never been out of the possession of the pledgor, the pledgee can have no privilege in regard to it as against third persons.<sup>3</sup> Therefore a pledge cannot be effected by any understanding or agreement or arrangement between the pledgor and pledgee which is unattended with a transfer of possession to the latter.<sup>3</sup> But a pledge may be in the possession of the pledgor for a special and temporary purpose without divesting it of its character; *e. g.*, where a security is handed back to the pledgor for the purpose of collection;<sup>4</sup> or where the pledgee delivered it to the pledgor to have it exchanged for stock and returned back to him, he did not lose the lien on the bond, and could maintain trover to recover it.<sup>5</sup>

3d. The repledge or rehypothecation of the stock by a pledgee.

The general rule is correctly stated by Mr. Schouler<sup>6</sup> as follows: "It has long been admitted that a pledgee may as-

<sup>1</sup> Cases cited ante, p. 602 et seq.      sey vs. Schneider, id. 496; D'Meza

<sup>2</sup> Code Napoléon; art. 2076; Civil Succession, 26 La. Ann. 35.  
Code of La. art. 3162.

<sup>3</sup> Clark vs. Iselin, 21 Wall. 360;

<sup>4</sup> Casey vs. Cavaroc, 96 U. S. 467; White vs. Platt, 5 Denio, 269; and  
Casey vs. National Bank, id. 492; Ca- in Hays vs. Riddle, 1 Sandf. 248.

<sup>5</sup> Id.

<sup>6</sup> Bailments, 201.

sign over the pledge so that the assignee shall take it subject to all the responsibilities under the original pledge transaction; or may deliver it into the hands of a stranger for safe custody; or may convey his interest conditionally by way of pledge to another person: in all of which cases his security will not be destroyed or impaired. But any such act on the pledgee's part is understood to be subject to all the original restrictions; for to attempt to pledge property beyond the pledgee's own demand, or to make transfer as though he were the absolute owner, is a breach of trust and a fraud upon the original pledgor."

It is not unusual for one who borrows money on a pledge of stock, as collateral security for its repayment, to give the lender at the same time an express authority to use the said stock for his own interest, either by way of pledge, mortgage, or absolute transfer, simply requiring him, in such case, if the borrowed money is repaid, to return to him, the borrower, an equal quantity of the same kind of stock, and not the specific stock originally pledged. The effect and reasons of such an authority to repledge stock are elucidated in *Ogden vs. Lathrop*,<sup>1</sup> where plaintiff gave defendant the power "to use, transfer, or hypothecate the same" at his option. Defendant sold the stock as his own, without notice to plaintiff. Subsequently it became nearly valueless by the failure of the company, and plaintiff sued him for wrongful conversion. The decision on appeal was that defendant committed no wrong when he sold the stock, as the same quantity of stock was returned to plaintiff. Earl, C., delivering judgment for the court, said: "This clause was inserted so that if, during the running of the loan, it was inconvenient for defendant to carry it, he could sell, transfer, etc., the stock to realize the money. It was doubtless inserted as an inducement to the

<sup>1</sup> 65 N. Y. 158, rev'g 3 J. & S. 73.

defendant to make the loan. . . . No notice of a sale under this clause was required, because plaintiff had no interest whatever in the sale. . . . The sale contemplated by this clause was not by defendant as pledgee, because it was not a sale after default. . . . It was a sale by virtue of the contract, and the only obligation imposed thereby upon the defendant was to return the same quantity of stock.”

So also stock pledged may, with the assent of the pledgor, implied as well as expressed, be used by the pledgee in any way consistent with the general ownership and ultimate rights of the former to have the same when the lien shall be discharged. The leading case in the State of New York upon this subject is *Lawrence vs. Maxwell*.<sup>1</sup> There plaintiff pledged certain stock certificates to defendant, a Stock-broker, as security against loss in proposed gold transactions. The dealings having been closed, plaintiff tendered defendant the amount due him and demanded the return of his certificates, which defendant could not return because he had disposed of them. On the trial defendant offered to show a custom by which a Broker was authorized to hypothecate or otherwise use securities received by him in pledge. This offer was rejected, and the Court of Appeals held it was properly rejected, because the right to sell the stocks, and so to change the title absolutely, would have been inconsistent with the contract of the parties and the rights accruing to the pledgor under the original pledge.

Allen, J., speaking for a concurrent court, said: “This custom, if proved as offered, did not authorize a sale of the stock, or any use or disposition of it by which the pledgor could be deprived of his property, . . . and would only affect the rights of the parties to the extent of permitting an hypothecation, or such other use of the pledge as should not destroy the

<sup>1</sup> 53 N. Y. 19.

property, or right of property, of the pledgor, or deprive him of the right to reclaim the pledge in specie. . . . Ordinarily, and in the absence of any agreement or assent by the pledgor, the pledgee would have no right to use the thing pledged, and a use of it would be illegal. . . . Conceding the right to use the stock pledged by way of hypothecation or otherwise, as claimed, and that it was at the time of the tender and demand lawfully out of the actual possession of the defendant, it was his duty at once to regain the possession and restore the same to the plaintiff. A neglect or refusal to do so gave to the plaintiff an action as for a conversion of the property.”<sup>1</sup>

In *Fay vs. Gray*,<sup>2</sup> where “the plaintiff contended that twenty-five shares in this corporation were like any other twenty-five shares, and that he was not limited in any respect by the certificate of twenty-five shares given him by the defendant, but that he could use this certificate and these shares as he pleased, sell and dispose of them to his own use, provided he at all times had twenty-five shares of the stock standing to his credit upon the books of the company *in certificates of larger or smaller numbers of shares than this certificate of twenty-five shares*,” the judge at the trial directed the jury that the plaintiff had “no right to convert the certificate and shares to his own use, sell, dispose of, and transfer the same for his own benefit, unless he immediately replaced the certificate by another of twenty-five shares; and that he was to hold a certificate of twenty-five shares of this stock set apart and ready to be transferred to the defendant whenever he should call for it.” This direction was excepted to, but fully sustained on appeal, Soule, J., remarking “that, as pledgee, he [plaintiff] was bound to keep the stock ready for delivery to the defend-

<sup>1</sup> This subject has already been discussed in its bearing upon Client—Ch. III. p. 141 et seq.  
<sup>2</sup> 124 Mass. 500.



ant on payment of the debt at maturity, or at any time afterwards before sale, in accordance with the terms of the pledge. *Meanwhile he had no right to sell or lend or pledge the stock."*

In *Hardy vs. Jaudon*,<sup>1</sup> it was held that the insertion of an express stipulation in the contract of pledge, that the pledgees should not be obliged to return the identical certificate, did not justify them in repledging the stock, or otherwise using it, before default, and that, having done so, they were guilty of conversion; but this case must be read in connection with the cases referred to in the third chapter,<sup>2</sup> where it is shown that Stock-brokers have the right to use the securities of their Clients, provided they keep on hand, or have within their control, sufficient of the same kind of securities to deliver to their Clients on demand.

In *Day vs. Holmes*,<sup>3</sup> the pledgee assigned the collateral stock to third persons without consideration, in order not to injure his credit by appearing to own too much of it (mining stock); but kept it in his own control by taking assignments in blank from those third persons, by means of which he could deliver the stock at once, in case the pledgor should become entitled to it. It was held that these facts, if proved, were a good defence to an action by pledgor.

The danger of loss which would be incurred by the pledgor of stock, if a Broker to whom he has pledged it were to be allowed to repledge it in such a manner as to put it beyond his control, has been recognized in Pennsylvania, where rehypothecation or repledge is prohibited by statutes given in the notes;<sup>\*</sup> but by amendment this act does not embrace Stock-brokers holding stocks on margin.

<sup>1</sup> 1 Robt. (N. Y.) 261, aff'd 41 N. Y. 619, note.

<sup>2</sup> P. 141 et seq.

<sup>3</sup> 103 Mass. 306.

<sup>\*</sup> The enacting clause as amended is as follows: "That it shall not be law-

ful for any person or persons, bank, savings fund, building association, or any corporation to repledge or rehypothecate any stocks, bonds, or other securities, received by any of them for money lent and borrowed, during

Story<sup>1</sup> says: "The pawnee [pledgee] may, by the common-law, deliver over the pawn into the hands of a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally by way of pawn to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof to his own creditor as if he were the absolute owner, it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee. The only question which, under such circumstances, would seem to admit of controversy is, whether the creditor should be entitled to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee." This last alternative question was directly adjudicated in *Donald vs. Suckling*,<sup>2</sup> where there was a pledging

the continuance of the contract of hypothecation or pledging of such securities; and such repledging or rehypothecation, without the consent of the party pledging the same, is hereby declared a misdemeanor, triable in the courts of quarter sessions; and, on conviction thereof, any person or persons, or the officers of any corporation, violating the provisions of this act, shall be sentenced to a fine not less than five hundred nor more than five thousand dollars, and undergo imprisonment for a period not exceeding five years, or both or either, at the discretion of the court before which such person shall be prosecuted. *Provided*, That this act shall not be construed to prevent brokers from pledging or hypothecating stocks or other securities which

they have purchased, in whole or in part, with their own money or credit, for others, and for which they have not been wholly reimbursed by the parties for whom such stocks or other securities have been purchased.

"Approved, the 10th day of June, A.D. 1881."

<sup>1</sup> Bailments (8th ed.), § 324.

<sup>2</sup> L. R. 1 Q. B. 585. To same effect, *Halliday vs. Holgate*, L. R. 3 Exch. 299. "The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded." 3 *Wait's Actions and Defences*, 427; *Walter vs. Smith*, 5 Barn. & Ald. 439; *McNeil vs. Tenth National Bank*, 46 N. Y. 325.

of debentures as collateral security for advances, and then a repledging by the pledgee as security for a larger amount, before default in payment by the pledgor; and it was decided that such repledging did not invalidate the original contract of pledge so as to give the first pledgor the immediate right to the possession of the pledge, so long as the debt due by him to the original pledgee remained unpaid; although Cockburn, C. J., and probably the other members of the court, were of opinion that such repledging was a breach of contract by the first pledgee. The decision in this case seemed to rest mainly on the distinction between a simple lien and a pledge, the former being defined as merely the right to retain possession of the chattel, which right is immediately lost on the possession being parted with; while the latter is something much more than the mere right of possession, and invests the pledgee with a right to deal with the thing as his own if the debt be not paid and the thing redeemed at the appointed time. This case followed *Legg vs. Evans*,<sup>1</sup> where a lien is declared to be a "personal right which cannot be parted with;" and *McCombie vs. Davies*,<sup>2</sup> where Lord Ellenborough said that "nothing could be clearer than that liens were personal and could not be transferred to third persons by any tortious pledge of the principal's goods."

So also in *Johnson vs. Stear*,<sup>3</sup> the repledging of a dock warrant by the first pledgee before default of the pledgor was held to amount to conversion, which entitled the latter to damages, but did not annihilate the contract of pledge between the original parties, nor the interest of the first pledgee under that contract; Erle, C. J., remarking that such a deposit, with a power to sell in case of default, "created an interest and a right of property in the goods which was more than a

<sup>1</sup> 6 Mee. & W. 36, 42.

<sup>3</sup> 15 C. B. (n. s.) 330.

<sup>2</sup> 7 East. 5.

mere lien."<sup>1</sup> While, therefore, if the pledgee of stock make an unauthorized use of the same he may be liable to the pledgor as for conversion, yet in an action on that ground he may recoup the amount of the debt due him by the pledgor.<sup>2</sup>

These views upon the subject of repledge or rehypothecation were confirmed very recently by the Supreme Court of Tennessee,<sup>3</sup> where the court adhered to the general rule that a pledgee of stock has no rights, either by absolute sale or sub-pledge, to convey any greater interest than he himself has in the stock pledged; but they squarely held that this rule did not apply where the pledge was created by the transfer of a certificate of stock with a blank power of attorney to the pledgee, and that a sub-pledgee receiving the certificate from such pledgee in good faith and for value could hold the same for the sum advanced, although it exceeded the amount of the original pledge. The court said: "The weight of authority in those States which have adopted the rule, that the assignment of a certificate of stock with a blank power of attorney to transfer passes the whole title, legal and equitable, undoubtedly is that a sub-assignee, by sale or pledge, may acquire a better right than his assignor."

Where collateral security is sold by the pledgee in accordance with the conditions of the pledge, owing to the failure of the pledgor to pay the debt, the purchaser of such security does not stand in the relation of pledgee, nor is there any privity between him and the pledgor.<sup>4</sup> If the second pledgee

<sup>1</sup> That a pledgee may sell or assign all his interest in the pledge is supported by adjudications, at least indirectly (*Whitaker vs. Sumner*, 37 Mass. 399, 406; and § 2990 Civ. Code of California is simply declaratory of it).

<sup>2</sup> *Lane vs. Bailey*, 47 Barb. 395; *Work vs. Bennett*, 70 Pa. St. 484. See *Fant vs. Miller*, 17 Gratt. 187.

<sup>3</sup> *Cherry vs. Frost*, 21 Am. Law. Reg. 57, and see note by Francis A. Lewis, Jr. Esq.

<sup>4</sup> *Lewis vs. Mott*, 36 N. Y. 395; to same effect, *Talty vs. Freedman's Savings & Trust Co.* 1 MacArth. 522;

has received various parcels of stock which were pledged to the first pledgee by different parties, he must not select one or more of such parcels and sell them, to the destruction of their owner's title, and hand over the remaining parcels or securities to the other original pledgors unimpaired, but he must proceed *pari passu* in the application of the different securities to the satisfaction of his loan to the first pledgee or the repledgor;<sup>1</sup> and, if he will not do this, a court of equity will compel him to do so.<sup>2</sup> In fact, in such a case the different original pledgors have the relation and rights of sureties as to the first pledgee and to one another;<sup>3</sup> and a surety out of whose funds a creditor has obtained payment is entitled to contribution from all his co-sureties, so as to put them upon an equality, although they became sureties without any communication with each other and without any regard to order of time;<sup>4</sup> and this right rests on principles of natural justice and equity, and not on any implied contract.<sup>5</sup>

Van Vórst, J., applying these principles to the case of pledgors in *Gould vs. Central Trust Co.*,<sup>6</sup> remarked: "The claim of the plaintiffs is reasonable and just; and in arguing that the Central Trust Co. should have proceeded *pari passu*, . . . so that what loss should be occasioned to the parties whose stock and bonds Bonner & Co. wrongfully pledged to it shall fall on them ratably, they contend only for what equity approves; . . . the complete interest of

Wood's Appeal, 92 Pa. St. 379. See also *Merchants' Bank vs. Trenholm*, 12 Heisk. 526; *Halliday vs. Holgate*, L. R. 3 Ex. 299.

<sup>1</sup> *Gould vs. Central Trust Co.* 6 Ab. New Cas. 381; *Gould vs. Farmers' Loan & Trust Co.* 23 Hun, 322; *Chamberlin vs. Greenleaf*, 4 Ab. New Cas. 178.

<sup>2</sup> *Ex parte Alston*, L. R. 4 Ch. App. 168; *Semmes vs. Boykin*, 27 Ga. 47.

See *Broadbent vs. Barlow*, 3 De G. F. & J. 570.

<sup>3</sup> See *Vartie vs. Underwood*, 18 Barb. 561; *Barnes vs. Mott*, 64 N. Y. 397.

<sup>4</sup> *Norton vs. Coons*, 3 Denio, 130, aff'd 6 N. Y. 33; *Dearing vs. Winchelsea*, 1 Cox, 318.

<sup>5</sup> *Armitage vs. Pulver*, 37 N. Y. 494, 498; *Wells vs. Miller*, 66 id. 255; and see *Sayles vs. Sims*, 73 id. 551, 556.

<sup>6</sup> 6 Ab. New Cas. 381.

one real owner should not be spared at the expense of the other. Neither by a partial election, or intentional discrimination on the part of the pledgee, shall either party be disappointed." And it was adjudged that inasmuch as the stock pledged by the plaintiffs had been sold by the Trust Company, the second pledgee, to pay its loan to the first pledgee, the securities pledged by the other original pledgors should also be sold, and the proceeds divided between the plaintiffs and the other pledgors according to their interests and in equal proportions.

While, therefore, the pledgee of stock has no right, without authority from the pledgor, to repledge or rehypothecate it, or otherwise dispose of it in such a manner as to jeopardize the pledgor's title thereto or his general property therein, or affect his ultimate right to have it back on payment of his debt thereby secured—and, if he does so in violation of his obligation, is guilty of conversion and liable in damages—yet if he has the legal title to it, and does repledge it to a second pledgee, who advances money on the faith of it in good faith and without notice, the original pledgor cannot recover it from the second or last pledgee without paying to him the amount on the original pledge, and also the amount advanced by the second pledgee to his pledgor;<sup>1</sup> provided, of course, as we have before seen, there is nothing in the instruments of transfer and the endorsements upon the certificate to indicate that the certificate is held in pledge or affected with some trust in favor of another than the person who has the apparent ownership.<sup>2</sup> And the second pledgee has the right to sell the pledge to satisfy his own loan to the repledg-

<sup>1</sup> *Fatman vs. Lobach*, 1 Duer, 354; *New Cas.* 381; *Chamberlain vs. McNeil vs. Tenth Nat. Bank*, 46 N. Y. Greenleaf, 4 id. 178. 325; *Driscoll vs. West Bradley Mfg. Co.* 59 id. 96; and see *Merchants' Bank vs. Livingston*, 74 id. 223, 226; *Cowdrey vs. Vandenburg*, 101 U. S. Gould vs. Central Trust Co. 6 Ab. 572. <sup>2</sup> See *Leitch vs. Wells*, 48 N. Y. 585, 592, and cases cited ante, p. 599; also

or, but must pay over any final surplus of proceeds to the original pledgor.<sup>1</sup>

Quite in unison with *McNeil vs. Tenth National Bank*,<sup>2</sup> and with the proposition that a pledgor of stock who invests his pledgee with the apparent ownership thereof is thereby precluded from setting up his title against that of a *bona fide* repledgee for value, is the New York Factors' Act,<sup>3</sup> which enacts, in substance, that any factor who is intrusted with the documentary evidence of title of property is to be deemed the owner thereof so far as to give validity to any pledge, lien, or transfer created by him.<sup>4</sup>

Where goods pledged have been disposed of by the pledgee, who, however, substitutes in their place, and delivers to a purchaser from the pledgor, upon the order of the latter, other goods of the same kind, quality, and value, which are accepted by the purchaser, the latter cannot take advantage of the wrong of the pledgee; and it is no defence to an action by the pledgee to recover the amount of his lien upon the goods.<sup>5</sup>

So one who has purchased from the general owner goods pledged for advances, with knowledge or notice of the lien of the pledgee, and who receives the goods from the latter with notice of his claim of a lien thereon for a specific amount, takes them with the obligation to pay the lien, and, in an action therefor, cannot offset a claim against the pledgor.<sup>6</sup>

<sup>1</sup> *Matter of Bonner*, 8 Daly, 75; *Gould vs. Central Trust Co.* 6 Ab. New Cas. 381; *Gould vs. Farmers' Loan & Trust Co.* 23 Hun, 322.

<sup>2</sup> 46 N. Y. 325.

<sup>3</sup> Laws of 1830, ch. 179, § 3, as enlarged by Laws of 1858, ch. 326, § 6.

<sup>4</sup> See *Cartwright vs. Wilmerding*, 24 N. Y. 521, and the cases there cited, which show how the act operates to protect pledgees and others who deal with factors on the faith of the docu-

mentary evidence of title intrusted to them by their principals. Substantially the same as the New York Factors' Act is the English statute 6 Geo. IV. c. 94, extended somewhat by 5 and 6 Vict. c. 39. See *Hatfield vs. Phillips*, 14 Mee. & W. 665, in construction of said statute.

<sup>5</sup> *Carrington vs. Ward*, 71 N. Y. 360. But the court held that the pledgees had no right to dispose of the pledgor's oil and substitute other oil in its place.

<sup>6</sup> *Id.*

In concluding this chapter we have again to remark that in all questions in which stock certificates have been involved, the tendency of the courts is to protect the *bona fide* holder or purchaser; and from the mass of decisions upon this branch of the law, there now exists an exception to the general rule that an assignee of a chose in action takes no better title than his assignor, so definite and deeply rooted as to be incapable of change.



CHAPTER X.

REMEDIES.

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*I. Remedies of Stock-brokers and Clients against Each Other.*

- (a.) *Relation of Brokers to Each Other.*
- (b.)     "    *of Clients to Each Other.*
- (c.) *Liability of Brokers to Undisclosed Clients.*
- (d.)     "    *of Undisclosed Clients to Brokers.*
- (e.)     "    *of Brokers to their Own Clients.*
- (f.)     "    *of Clients to their Own Brokers.*

- 1. *General Indemnity.*
- 2. *Banker's Lien.*
- 3. *Stock-broker's Lien.*

*II. Specific Performance of Contracts for Sale of Stock.*

- (a.) *Preliminary Observations.*
- (b.) *General Rule.*
- (c.) *When Specific Performance Refused in England.*
- (d.) *In Cases Involving "Calls" when Relief Refused.*
- (e.) *In Cases of a Miscellaneous Character.*
- (f.) *When Specific Performance Decried in England.*

*III. Specific Performance in the United States.*

- (a.) *Preliminary Observations.*
- (b.) *When Relief Refused.*
- (c.) *When Decried as to Railway Shares.*

*IV. Mandamus.*

*V. The Effect of Usury upon Stock Transactions.*

*VI. Statute of Frauds.*

*I. Remedies of Stock-brokers and Clients against Each Other.**(a.) Relation of Brokers to Each Other.*

THERE exist a great many elements in a transaction on the Stock Exchange which are not found in the simple and ordinary relation of principal and agent. An agent instructed by his principal to sell or buy personal property would, ordinarily, find a purchaser or seller, disclose his relation, bring the parties together, and receive his commissions. Not so with a Stock-broker in carrying out a speculative transaction in stocks through the Stock Exchange; for he not only does not disclose his principal, but jealously conceals his name. He acts, and by the rules of the Exchange is regarded, as principal; and in consummating the transaction uses his own money, receives and holds the property, and merely obtains from his Client a margin sufficient to protect him against the fluctuations of the market. Yet the only interest the Broker has in the transaction is a brokerage or commission.

What the respective relations of all the parties to each other are in such dealings will be best seen by considering the position of the different parties separately.

As we have seen, Stock-brokers, in their dealings with each other are, by the rules of the Exchange, regarded as principals. These rules are binding, because the members of the Exchange, upon becoming members, agree to abide by them; and<sup>1</sup> it is only when these rules conflict with the law, or are unreasonable, or against public policy, that the courts will interfere with them. This leaves the Stock Exchange with jurisdiction to enforce all contracts between its members, and

<sup>1</sup> Pp. 32, 351. And Brokers, being the Statute of Frauds (*Brownson vs. Chapman*, 63 N. Y. 625).

the courts can only be called upon in exceptional cases to interfere with that domestic forum. And this rule holding the Brokers liable to each other as principals is not only reasonable, but it arises out of the necessities of the case. For Brokers, in making their transactions, do not disclose the names of their Clients; indeed, by what may be termed the *esprit de corps* of Brokers, it is regarded as an abuse of confidence to reveal the names of the persons for whom they act. Besides, Stock-brokers habitually make operations for their own account, and it is utterly impossible to discriminate in their dealings upon the Exchange whether they are acting for their Clients or for themselves.

And this rule of the Exchange, making the Brokers primarily liable to each other, accords with the well-settled principle of law that an agent, in dealing with third persons, should disclose his agency, or he will be held personally responsible to them; <sup>1</sup> and that it is only where the agent makes a contract on behalf of a principal, whose name he discloses at the time, that he is not personally liable.<sup>2</sup> A vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer or Broker who is usually employed in selling or buying property as an agent.<sup>3</sup> And where a defendant was employed as agent to buy at an auction, but he did not disclose his agency either at the time of bidding or when paying the deposit, it was held that he was individually liable on his bid, and could not shelter himself by proving that he acted as agent.<sup>4</sup>

<sup>1</sup> Walker's Am. Law (7th ed.), 280; McClernan vs. Hall, 33 Md. 293; Tilling vs. Howard, 51 N. Y. 373; Collins vs. Buckeye Ins. Co. 17 Ohio St. 215; Woodbridge vs. Blair, 18 Iowa, 572.

<sup>2</sup> Rathbon vs. Budlong, 15 Johns.

<sup>3</sup> Jones vs. Littledale, 1 Nev. & P. 677; Magee vs. Atkinson, 2 Mee. & W. 440; Mills vs. Hunt, 20 Wend. 431.

<sup>4</sup> McComb vs. Wright, 4 Johns. Ch.

659.

In view, therefore, of the jurisdiction of the Exchange to enforce all contracts made between its members on the Exchange, the cases necessarily must be rare in which the courts will or can be called upon to examine the transactions of Brokers as between themselves; although in most instances the bargains there made, being oral, could hardly be sustained under the Statute of Frauds, requiring such agreements, where more than fifty dollars are involved, to be in writing.<sup>1</sup>

(b.) *Relation of Clients to Each Other.*

The relation to each other of principals who authorize transactions to be made upon the Exchange is not so simple as the one to which we have just alluded; and yet, if the principles of the law of agency are applicable to the transactions—and there would seem to be no good reason to the contrary—the question is comparatively plain and free from difficulty. But the position of the parties should be thoroughly understood. In the first place, the principals not only never meet, but they are never known. A Client ordering his Broker to purchase shares upon the Exchange knows and expects that the Broker will buy them of a fellow-Broker, who may be acting for himself or an undisclosed selling Client. And it is the uniform usage of Stock-brokers, upon making a purchase or sale for their Clients, immediately to make out and deliver to the latter a report containing the description and price of the securities dealt in, and the *name* of the opposite Broker with whom the transaction has been made.<sup>2</sup> What, if any, effect this circumstance would have upon the relation of the principals to each other has seemingly never been considered. There is, in fact, no communication between the

<sup>1</sup> *Brownson vs. Chapman*, 63 N. Y. 625. Client on his right to recover commissions was considered in the case of *Hoffman vs. Livingston*, 14 J. & S. (N. Y.) 552.

<sup>2</sup> The effect of the omission of the Broker to deliver this note to his

Clients whatever, as appears from the following detailed account of the transaction:

A, desiring to purchase one hundred shares of stock, employs B, a Stock-broker. The latter goes upon the Exchange and finds C, a fellow-Broker, who will sell the shares; whereupon the bargain is made. C, in fact, represents D, who has ordered him to sell. B, upon the consummation of the bargain, sends a *report* to his Client, A, of the purchase from C, the Broker; and C likewise sends a report to D of the sale. The shares are in due course delivered by C to B, and the latter pays for them. B and D never meet, their names are never mentioned, and they neither sign nor deliver any paper relating to the bargain. Nor is there any communication between A and C or B and D in respect to the business. Is there any privity in such a transaction between A and D? Is there a contract between them? Have they reciprocal rights and duties?

Before referring to the adjudications upon this subject, we should advert to a well-established principle of law that, in case of a simple contract, an undisclosed principal may show that the apparent party was his agent, and may put himself in the place of the latter, but not in such a way as to affect injuriously the rights of the other party. Where an agent, in dealing for his principal, acquires rights for him, the principal may sue in his own name to enforce them, notwithstanding he was a resident abroad, and the agency was concealed from defendant.<sup>1</sup> If there is nothing on the face of the written contract to indicate agency, but one of the contracting parties is in reality an agent, contracting on behalf of an unknown and undisclosed principal, the latter may, at any subsequent period, so long as the contract remains executory, come forward and claim the benefit of it; but he is, of course, bound by all

<sup>1</sup> *Taintor vs. Prendergrast*, 3 Hill, 72.

the equities raised by his agent while dealing apparently as a principal, and can take such rights of action only as the latter possesses at the time that he, the principal, discloses himself.<sup>1</sup>

This doctrine has been most extensively applied to all kinds of executory contracts in writing not under seal, it being uniformly held that such contracts may be enforced by principals, although executed in the name of the agent, and this whether he describes himself as agent or not.<sup>2</sup>

Now, if this doctrine is applicable to the transactions of the Stock Exchange, there is no doubt but that the law will, in the transaction which we have described, substitute the principals in the place of their respective Brokers. And this seems to be firmly settled by the cases.

In our analysis of a transaction in securities on the London Stock Exchange, this subject was extensively considered in respect to the liability of principals for "calls"<sup>3</sup> upon shares purchased through Brokers; and it was found that the English courts, with entire unanimity, held that there was a perfect and enforceable contract, both in law and equity, between the vendor and vendee. As these cases have been fully reviewed in Chapter V., it is unnecessary to do more than mention them in this connection. The question of privity was rigorously disputed; but, after a full consideration of the subject, the courts found no difficulty in reaching the conclu-

<sup>1</sup> Girard vs. Taggart, 5 Serg. & R. 27; Taintor vs. Prendergrast, 3 Hill, 72; Edwards vs. Goulding, 20 Vern. 30; Commercial Bank vs. French, 21 Pick. 486; Huntington vs. Knox, 7 Cush. 71; Carr vs. Hinckcliff, 4 B. & C. 547; Fish vs. Kempton, 7 C. B. 692; Kelly vs. Munson, 7 Mass. 324; Wait vs. Johnson, 24 Vern. 112; Violet v. Powell, 10 B. Mon. 347; Gardner vs. Allen, 6 Ala. 187; Wharton on Agency, § 403.

<sup>2</sup> Briggs vs. Partridge, 64 N. Y. 357; Nicoll vs. Burke, 78 id. 581. There

is a well-recognized exception to the above rule, however, in the case of notes and bills of exchange, resting upon the law-merchant. Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; and a person not a party cannot be charged upon proof that the ostensible party signed or endorsed as his agent (Briggs vs. Partridge, *supra*).

<sup>3</sup> Ch. V. p. 273 et seq.

sion that the principals should be substituted in the place of the Brokers.

As by the method of dealing upon the London Stock Exchange, the representative character of a Stock-broker is entirely submerged, and he deals and is regarded only as principal, there would seem to be no good reason why this class of decisions should not be followed as precedents in this country. There is one circumstance, however, which should be mentioned in applying the English cases to dealings in the United States—viz., that by the rules of the London Stock Exchange the Brokers and Jobbers are two different characters, and they cannot act in both capacities in the same transaction. The Broker is known to be dealing for a principal in the transaction which he makes, whereas the Jobber always acts on his own account. But we do not attach much importance to this fact, because at most it amounts to but a breach of the rules of the Exchange; and, notwithstanding its breach, the members would still, by the same rules, be liable primarily to each other upon their contracts.<sup>1</sup>

We therefore conclude that both in England and in the United States, in a transaction made through the Exchange by Brokers, the vendees or vendors are liable to each other, subject, of course, to intervening equities to the same extent and in the same manner as if the contracts had been made by agents for unknown principals in the ordinary course of business. But the usage of Brokers has been an important factor in establishing this result, and it might in certain cases operate as an exception to the principle.

*(c.) Liability of Brokers to Undisclosed Clients.*

The relation of a Client to the Broker or Jobber, who makes the contract on the Exchange with his own represent-

<sup>1</sup> Consult, as to effect of violating rules, *Royal Exchange Ins. Co. vs. Moore*, 11 Week. Reporter, 592.

ative, suggests an important and interesting question. In the illustration heretofore given,<sup>1</sup> this involves the relation between A, the vendor or purchaser, and the Broker, C, who deals with the Broker of the vendor. As has been described, upon the completion of the order to purchase or sell, B, the Broker of A, immediately makes out and delivers to A a report or notice containing a statement of the kind of securities dealt in, the price paid or received, and the name of C, the Broker with whom the transaction has been made, and who appears in the business as principal. If there is a privity between the purchasing and selling Clients, A and D, as in the preceding section we have seen there clearly is, the reasons are still more cogent to establish a legal relation between A and C, because the name of the latter is reported to A as the principal, and, to all intents and purposes, C is the real contracting party. By a well-understood and frequently applied rule of the law of agency, an agent may in certain cases become liable as principal; for although ordinarily he is exempt from personal liability if he act within the scope of his authority and properly discloses his principal's name, yet an agent is at liberty to incur a personal liability, if he chooses to do so, by his own act or contract, or where from his own conduct or the form of the act or contract it is necessarily implied or created by operation of law. Hence, in the following instances, an agent will be liable to third persons:

1st. When the agent makes the contract in his own name;<sup>2</sup> and parol evidence is not admissible in such case to show that the agent is not the real party.<sup>3</sup>

2d. Where he voluntarily incurs a personal responsibility either express or implied.<sup>4</sup>

3d. Where he does not disclose the name of his principal,

<sup>1</sup> P. 677.

Snelling vs. Howard, 51 N. Y. 373;

<sup>2</sup> Benjamin on Sales (3d Am. ed.), Briggs vs. Partridge, 64 id. 357.

209; Wharton on Agency, §§ 280, 504;

<sup>3</sup> Id. <sup>4</sup> Wharton on Agency, § 490.



and ordinarily, when the principal is discovered, either the agent or principal may be held.<sup>1</sup> And where a bought or sold note expressly states that the transaction is made for a principal, but whose name is not disclosed therein, evidence of usage is admissible to show that the Broker is personally liable when the name of the principal is not disclosed at the time of the contract.<sup>2</sup>

4th. Where he exceeds his authority.<sup>3</sup>

5th. Agents or factors acting for foreign principals are personally liable upon all contracts made by them for their employers.<sup>4</sup> But this rule does not apply to the extra-territorial relations of the States of the Union; and it has accordingly been held that agents or factors acting for merchants residing in another State are not personally liable for contracts made by them for their employers.<sup>5</sup>

6th. Where the agent does not possess any authority, or exceeds it, he is personally liable.<sup>6</sup>

7th. So an agent is held personally responsible where there is no other responsible principal to whom resort can be had.<sup>7</sup>

8th. He is also liable when he is guilty of fraud or deceit.<sup>8</sup>

There are other instances in which an agent may be held liable; but for the purposes of this discussion it is not necessary to enlarge the present enumeration. But an important exception to these general rules arises in those cases where *no credit is given to the agent*, in which event he is not personally liable;<sup>9</sup> the rule of the law being that he to whom the credit

<sup>1</sup> Id. § 496, and cases heretofore cited.

<sup>2</sup> *Humfrey vs. Dale*, 7 El. & Bl. 266; El. B. & E. 1004; 26 L. J. Q. B. 137; 27 id. 390; *Fleet vs. Murton*, L. R. 7 Q. B. 126; *Tetley vs. Shand*, 20 W. R. 206. Consult also *Mollett vs. Robinson*, L. R. 5 C. P. 648; 7 C. P. 84; H. L. Cas. 802.

<sup>3</sup> *Baltzen vs. Nicolay*, 53 N. Y. 467; *Dung vs. Parker*, 52 id. 494.

<sup>4</sup> *Story on Agency* (8th ed.), § 268; *Wharton on Agency*, § 514.

<sup>5</sup> *Vawter vs. Baker*, 23 Ind. 63.

<sup>6</sup> *Story on Agency* (8th ed.), § 264.

<sup>7</sup> Id. § 230.

<sup>8</sup> *Wharton on Agency*, § 541, 542.

<sup>9</sup> *Buck vs. Amidon*, 41 How. (N. Y.)

is knowingly and exclusively given is the proper person who incurs liability, whether he be the principal or the agent.<sup>1</sup>

Confining our observations, in the application of the above general principles, to those cases which have arisen out of transactions on the Stock Exchange, we find in England it has been repeatedly held that the Jobber or Broker purchasing from the Broker of a vendor is personally liable to indemnify the latter for "calls" made upon shares sold, and that there is a direct contract between such parties; although by the rules of the Exchange, before alluded to, the members of the latter body are principally liable to each other for the fulfilment of their contracts. It is true that by the usages of the London Exchange the Jobber may substitute another in his stead in the contract before the settling-day, and in certain cases the vendor will be bound thereby; but this does not touch the question of the liability of the original Jobber to the vendor.

But it is not only in cases involving the liability for "calls" that the courts have adjudged that there was a legal privity between an undisclosed Client and a Jobber or Broker dealing with his representative, but in the cases which we shall now proceed to notice the same result was reached.

In *Royal Exchange Insurance Co. vs. Moore*<sup>2</sup> the plaintiffs authorized S., a Stock-broker, to purchase for them certain debentures. On the same day, S. reported that he had bought the debentures of the defendants, M. & C., who were also Stock-brokers. It being the usage of the Stock Exchange that no principal is named on either side, S. was ignorant of the name of the person for whom M. & C. were acting; but as they were Brokers, and not Jobbers, he knew that they were dealing, not on their own account, but for an unknown

Pr. 370; *Scrace vs. Whittington*, 2 B. & Cress. 11; *Iveson vs. Connington*, id. 160; *Cunningham vs. Soules*, 7 Wend. 106.

<sup>1</sup> Story on Agency (8th ed.), § 288 and note, where a full collection of cases will be found.

<sup>2</sup> 11 Week. Reporter, 592.

principal. M. & C., however, gave a sold note signed with their own names. They were, however, acting in the transaction for one A., who subsequently delivered to them a deed of transfer of the debentures, which was forged. This in time was delivered to S., who handed it to plaintiffs; and the latter was afterwards compelled to deliver it to the true owner, together with the dividends collected thereon, by virtue of a decree of court. The plaintiffs thereupon brought suit against the defendants, who were held liable on the ground that they had signed the sales note and were concluded thereby.

Considering that defendants were acting as conceded Brokers in the transaction, and that the sold note was made out in accordance with a known usage not to disclose the principal, this case, while apparently not open to question, is one of the most stringent applications of the rule.<sup>1</sup>

In *Nickalls vs. Merry*,<sup>2</sup> a Jobber who had agreed with the Broker of an undisclosed principal to purchase certain shares, and who had given the name of an infant as the transferee, by reason of which the principal was compelled to pay certain calls, was held liable to pay the same in an action brought against him by such undisclosed principal; although, by the rules of the Stock Exchange, all the members of the latter body were regarded as principals to each other. Lord Hathorley, in this case, said: "Nobody denies that when a Broker sells shares for his principal (who is what is called an 'outsider,' and who has employed him to sell the shares) to anybody in the market, whether a Jobber or a Broker, there is a good and valid contract made between those parties—that

<sup>1</sup> The court cited and relied upon 266; Eng. C. L. 90; *Thomson vs. Higgins vs. Senior*, 8 Mee. & W. 834; *Davenport*, 9 B. & C. 78; *Pennell vs. Jones vs. Littledale*, 6 Ad. & E. 486; *Alexander*, 3 El. & Bl. 283. *Trueman vs. Loder*, 11 id. 595. See <sup>2</sup> 1875, L. R. 7 H. L. E. & Ir. App. also *Humfrey vs. Dale*, 7 El. & Bl. Cas. 530, rev'g L. R. 7 Ch. App. 733.

is to say, between the person whose shares are to be sold and the Jobber who purchases those shares from the vendor's Broker." <sup>1</sup>

And the same result was reached in a later case,<sup>2</sup> in which it was held that where defendant, a Share-broker, had purchased shares of the plaintiff without at the time disclosing any principal, he was liable to indemnify plaintiff for all calls made, and which plaintiff had been compelled to pay by reason of the shares being, at the request of defendant, registered in the name of an infant.

So in *Stray vs. Russell*,<sup>3</sup> an action was brought by a vendee, who had ordered his Broker to buy shares on the Stock Exchange, against the Jobber who had sold the shares to the vendee's Broker; and, although the action was not sustained, the decision was not placed on the ground of any want of privity between the parties, notwithstanding the vendee's name had not been disclosed in the transaction.

*(d.) Liability of Undisclosed Clients to Stock-brokers.*

If the undisclosed Clients have enforceable rights against the Brokers contracting with the representatives of the former, it follows by parity of reason that the Brokers have similar rights against the principals when they are discovered, and that they may elect which of the two to hold—the Brokers with whom they contract, or their principals. And, as will be seen, the English courts have very consistently enforced this liability in several cases, which are fully reviewed in Chapter V. of this work.<sup>4</sup>

As oral evidence is admissible to show that the contracting party was an agent, so as to give the benefit of the contract to

<sup>1</sup> See also *Coles vs. Bristowe*, L. R. 4 Ch. App. 3; *Booth vs. Fielding*, 1 W. N. 245.

<sup>2</sup> *Watson vs. Miller*, 11 Week. Notes, 18 (1876).

<sup>3</sup> 1 El. & El. 888.

<sup>4</sup> P. 273 et seq.

the unnamed principal, it is also admissible to fix the principal as the party really interested in the matter; and make him liable upon the contract. This evidence "does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal."<sup>1</sup>

In the case of *Mocatta vs. Bell*,<sup>2</sup> the defendant left certain Spanish bonds, passing by delivery, with his Stock-broker to borrow money upon. The latter borrowed money from the plaintiff, also a member of the Stock Exchange, and deposited a part of the bonds; this was done without disclosing, as is the custom, the name of the principal. On others of the bonds the Stock-broker, without the knowledge of his principal, obtained a further sum of money, which he applied to his own use. The defendant afterwards gave notice that he should settle his account, and on the settling-day he sent a check to his Stock-broker for the principal and interest then remaining due, and the Stock-broker applied this money to redeem the bonds deposited to secure the money he had applied to his own use, and a part of the bonds deposited to secure the loan obtained for the defendant; and, on delivering the redeemed bonds to the defendant, the Stock-broker informed him that his assets were not sufficient to redeem the other bonds, and that he had postponed the further settlement to the following settling-day. The Stock-broker on that day informed the defendant that his assets were still insufficient. It was then arranged between the Stock-broker and the defendant that the former should give his check to the plaintiff for the sum due, and that the defendant, on receiving the

<sup>1</sup> *Higgins vs. Senior*, 8 Mee. & W. 72; *Upton vs. Gray*, 2 Greenl. 373; 844; *Beckham vs. Drake*, 9 id. 96; 11 *Hyde vs. Wolf*, 4 La. Rep. 234; *Clealand vs. Walker*, 11 Ala. 1064. 413; *Taintor vs. Prendergrast*, 3 Hill, <sup>2</sup> 27 L. J. Ch. 237.

bonds, should give him his check for a sum sufficient to enable the Stock-broker to meet the check he was to give to the plaintiff. Accordingly, the bonds were obtained by the Stock-broker on his crossed check, and delivered to the defendant, but the latter refused to give his check for the sum required, and the Stock-broker's crossed check, in passing through the Clearing-house, was dishonored. In a suit praying that the defendant might be ordered to deliver up the bonds or to pay the plaintiff the amount of his advances thereon, and for an injunction restraining the defendant from parting with the same in the interim, it was held that the plaintiff was entitled to judgment; that he was not deficient in caution in taking the crossed check, and that he was not bound to inquire whether it would be honored before delivering the bonds; and that the defendant's conduct amounted to an *ex post facto* fraud at least, from the consequences of which he could not escape.

(e.) *Liability of Brokers to their Own Clients.*

We have already discussed and stated the liability of Brokers to their Clients in the third chapter of this work,<sup>1</sup> and it will be sufficient to notice in this connection the form of the actions by which this remedy may be enforced.

In *equity*, the best-known remedy to enforce a liability where there have been numerous transactions between the Client and Broker is by bill for an accounting. It is one of the settled principles of equity jurisprudence that where the relation of principal and agent, or Broker, exists, a bill in equity will lie to compel an accounting. And the liability to do this follows, as a matter of course, from the admission or establishment of the agency.<sup>2</sup> By means of a bill filed by the

<sup>1</sup> P. 123 et seq.

<sup>2</sup> 1 Daniel's Ch. Pr. & Pl. (4th Am. ed.) 856; Palmer vs. Palmer, 13 How. (N. Y.) Pr. 363; Wiggins vs. Gans, 4 Sandf. 646; Story vs. Brown, 4 Paige Ch. 111. For general principles of actions against agents for accounting, see 1 Jac. & Walk. 135; 14 Ves. 500,

principal, or Client, against the agent, or Broker, all of the transactions may be investigated, and a fuller and more satisfactory result reached than by any other means.

The rule of practice in bills for an accounting under the old chancery system, which has not been substantially modified by a codification of the methods of practice, or by the abolition of legal and equitable actions into one general remedy,<sup>1</sup> was well stated in the case of *Wiggins vs. Gans*,<sup>2</sup> as follows: "An accounting party, however, does not stand in the situation of a mere witness. The rendering of the account is a duty which he is required to perform. He is to furnish materials which are to be the subjects of examination and proofs of the witnesses—materials which, in most cases, can be furnished by him alone. The decree to account implies that he has failed in obligations which he owed to his principal, and is a mode of compelling him to do that which he ought to have done voluntarily. There is, moreover, a manifest propriety in requiring a party who has acted in a fiduciary capacity for another as factor, agent, or trustee, who in that capacity has received and disbursed moneys; not only to furnish a full and true account of his receipts and disbursements, but to do so under the solemnity of an oath."

But where, on a bill filed for an accounting, there is no admission in the answer of the agency, the burden is on the plaintiff, in the first place, to establish that fact.<sup>3</sup> After the fact is established, the usual course in a court of chancery is to refer the matter to a master to state the account; but, in those States where codes of procedure exist, the general course of practice would be to refer the whole case to a master or referee in the first instance, although this disposition rests largely in the discretion of the courts.

510; 8 id. 49; 13 id. 47, 53; 4 Madd. 373; 1 Chit. Gen. Pr. 509, 868, 869; Ketchum vs. Clark, 22 Barb. 219.

<sup>1</sup> Id.

<sup>2</sup> 4 Sandf. 646.

<sup>3</sup> 1 Daniel's Ch. Pr. & Pl. (4th Am. ed.) 856.

The bill in equity for an accounting, however, would only be necessary where the Client sought to review the whole or a large portion of the transactions of the account between himself and his Broker; for if the objectionable transactions, matters, or items were few and isolated, the better and perhaps the only remedy would be by action at law.

The Broker has a well-established answer or defence to the bill for an accounting if he has already furnished an account, and the transactions between himself and his Client have been adjusted and settled; for it is a well-recognized principle of equity pleading that an account stated furnishes a complete and full answer to a bill for an accounting, unless fraud or mistake can be shown, which is now universally regarded as sufficient to set aside, at least *pro tanto*, an account stated.<sup>1</sup> But a failure to object or dissent to a Brokers' account does not always constitute an account stated.<sup>2</sup> An account rendered becomes an account stated if not objected to in a reasonable time. Four months held to be in this case such an unreasonable time as to amount to an estoppel.<sup>3</sup> And where the complainant files a bill for a general account, and the defendant sets forth a stated account, the complainant must amend, for the account stated is a bar *prima facie* until the particular errors are assigned.<sup>4</sup> And where, to such a bill, the *defence* set up is that there has been an "account stated" between the parties, the onus is upon the plaintiff to show that there is fraud or mistake involved in the account; and he is compelled to allege and prove specifically the particular

<sup>1</sup> Weed vs. Small, 7 Paige, 573; 2, 101; Curtis's Eq. Prec. 169, 170; Leycraft vs. Dempsey, 15 Wend. 83; Willis Eq. 550; Emery vs. Pease, 20 Stoughton vs. Lynch, 2 Johns. Ch. N. Y. 62, 64.  
<sup>2</sup> Quincy vs. White, 63 N. Y. 370.  
<sup>3</sup> Colket vs. Ellis, 10 Phila. 375.  
<sup>4</sup> Quincy vs. White, 63 N. Y. 370.  
<sup>5</sup> Id.

209; Lockwood vs. Thorne, 11 N. Y. 170, rev'g s. c. 12 Barb. 487. As to how an account stated should be pleaded to a bill for an accounting, see 3 Daniel's Ch. Pr. & Pl. (4th ed.)



items of the account which he claims should be stricken out as fraudulent or the result of a mistake.<sup>1</sup>

The stating of an account is in the nature of a new promise;<sup>2</sup> and such an account will not be opened on probable testimony. It requires strong and very conclusive evidence of fraud or mistake to justify the court in awarding such a result.<sup>3</sup> But where an agent has made a mistake in an account, he will not be bound by the account as given, although his principal has acted upon the presumption of its correctness in his dealings with third parties, as where the principal was a Stock-broker, and the mistake in the account was one which the knowledge of the usage of the stock market might have enabled him to detect.<sup>4</sup>

In respect to other equitable actions, it has been held that a court of equity has no general jurisdiction over actions to redeem personal property—*i. e.*, stocks—pledged with Brokers as margins, without some other circumstances rendering its interference necessary. The remedy at law is ample, by tender of the amount due and a possessory action to recover the articles pledged, or damages for their detention. The only ground of equitable jurisdiction over an action for the redemption of personal property pledged, besides the necessity of a *discovery*, and perhaps *an assignment of the property pledged*, is the necessity of *taking an account*. Accordingly, where an action is brought to redeem certain securities in the hands of defendants, as Stock-brokers, upon paying the amount due thereon, and for an injunction order restraining the defendants from selling such securities until an account

<sup>1</sup> *Id.*; *McIntyre vs. Warren*, 3 Ab. N. Y. 170. But see *Barrow vs. Rhineland*, 1 Johns. Ch. 550; 3 *id.* 614, Ct. App. Dec. (N. Y.) 99, where form of bill to set aside an account stated will be found; *Drew vs. Power*, 1 Sch. & Lef. 192.

<sup>2</sup> *Holmes vs. D'Camp*, 1 Johns. 34; *Allen vs. Stevens*, 1 N. Y. Leg. Obs. 359.

<sup>3</sup> *Wilde vs. Jenkins*, 4 Paige, 481. See also *Lockwood vs. Thorne*, 11 Dails vs. Lloyd, 12 Q. B. 531.

can be taken of the amount due the defendants, it cannot be sustained where it appears that the claim on the part of the defendants can only consist of one item—the original advances by them, or so much of them as remain unpaid.<sup>1</sup>

So the court will not interfere by injunction to relieve in respect of a speculative transaction upon the Stock Exchange where the claim to relief amounts in effect to this, that the plaintiff has been misled by the trick of some fellow-speculators to enter into a transaction which has not turned out so profitable as he expected.<sup>2</sup> But courts of equity will assume jurisdiction to restrain the enforcement of unexecuted contracts founded on wagers or bets prohibited by law.<sup>3</sup> Nor will a court of equity issue an injunction to restrain a Stock-broker from selling stocks held by him on margin for his Client, without showing insolvency on the part of the Broker and irreparable injury.<sup>4</sup>

In respect to the actions at law which may be brought against the Broker, we have seen, in the third chapter,<sup>5</sup> that for all illegal acts of omission or commission on the part of the Broker by which the Client is damaged, the latter has a remedy for damages against the former, either *ex delicto* by the common-law action on the case for violation of his duty, or by action of assumpsit for breach of the Broker's implied or express contract properly to transact his Client's business.<sup>6</sup>

<sup>1</sup> *Durant vs. Einstein*, 35 How. (N. Y.) Pr. 223. But in *Fowle vs. Ward* (113 Mass. 548), where the pledgor sought the specific equitable remedy of being replaced in his original position, the court held that all the defendant pledgee could have lawfully done was to hold the shares and have them forthcoming for the true owner on demand; that, instead of so doing, he, by his own fault, had caused the plaintiff to lose them, and therefore the "only equitable remedy was to replace them or en-

able the plaintiff so to do for himself," by paying him the value of the stock at the time of the filing of the bill.

<sup>2</sup> *Rees vs. Fernie*, 13 W. R. 6.

<sup>3</sup> *Petillon vs. Hipple*, 90 Ill. 420.

<sup>4</sup> *Park vs. Musgrave*, 2 T. & C. (N. Y.) 571.

<sup>5</sup> P. 123 et seq.

<sup>6</sup> For forms and general principles relating to actions in assumpsit by principals against agents or Brokers, see 2 Chit. Pl.; and see also Ch. III. p. 123 et seq., where decisions are collected in actions against Stock-bro-

The general rule is, that the action of *assumpsit* will lie for the breach of all parol or simple contracts, whether verbal or written, or express or implied, or for the performance or omission of any other act arising out of the relation of principal and agent.<sup>1</sup>

It is well established that the action *ex delicto* on the case lies against all species of agents or bailees for breach of duty or misfeasance in the conduct or transaction of business committed to them.<sup>2</sup> It lies concurrently with *assumpsit*, although there be an express contract, if a common-law *duty* results from the facts; and the party may be sued in tort for any neglect or misfeasance in the execution of the contract.<sup>3</sup> For money held by the Broker and belonging to the Client, the ordinary action for money had and received would lie.<sup>4</sup> But where a Broker is sued for profits, a recovery cannot be had for damages for violating orders.<sup>5</sup> And payments made by the principal to the Broker, under false representations of the latter as to his having purchased the stock he was employed to purchase, may be recovered back.<sup>6</sup>

Where the defendant Stock-brokers are sued for the recovery from them of certain stock alleged to have been placed with them as margin to secure a stock speculation of plaintiff, the latter cannot recover as for a conversion of the stocks so bought for him. This would constitute a material

kers. A Stock-broker selling stock on credit, that act being contrary to the usual course of business, is liable in *assumpsit* to his principal (*Wiltshire vs. Sims*, 1 Campb. 258).

<sup>1</sup> 1 Chit. Pl., title "Assumpsit."

<sup>2</sup> *Id.*, title "Case." For declaration against Share-broker for not purchasing shares for the plaintiff at the market price according to order, see *Williams vs. The London Com. Exch. Co.* 10 Ex. 569. Also against a Broker for not giving his principal a true account of the purchases which he has effected for him, *Thom vs. Bigland*, 8 Ex. 725.

<sup>3</sup> *Id.* For forms and general principles relating to this species of action against a Broker, see 2 Chit. Pl., title "Case."

<sup>4</sup> *Fletcher vs. Marshall*, 15 Mee. & W. 763; Ch. III. p. 123 et seq.

<sup>5</sup> *Delevan vs. Simonson*, 3 J. & S. (N. Y.) 243.

<sup>6</sup> *Voris vs. McCredy*, 16 How. (N. Y.) Pr. 87.

variance even under the N. Y. Code of Procedure.<sup>1</sup> In an action against Brokers for selling without authority stock which they had purchased for the plaintiff, if the complaint shows that they purchased the stock for the plaintiff, to be delivered to him at his option within a specified time, but sold it meanwhile against his express instructions, it need not allege a demand and tender on the part of the plaintiff. An allegation that defendants sold it may be deemed, on demurrer, to imply that they had perfected the sale by delivery.<sup>2</sup>

In the State of New York, in actions by Clients against Stock-brokers, the form of remedy which has been more frequently used is that of trover for the conversion of the securities of the Clients by the Brokers. It is now settled that an action of trover will lie to recover damages for the conversion of certificates of stock.<sup>3</sup> And, as we have shown,<sup>4</sup> it is well established that, upon the purchase of securities by the Broker on margin, the latter is entitled to hold the same as collateral security for the amount which he advances in their purchase, the relation of pledgor and pledgee being created between the parties. The question as to what acts of a Stock-broker may constitute a conversion will generally depend upon the circumstances of each case, and it has been, and will always be, one of great delicacy. The general result of the authorities seems to be that if the agent parts with the property in a way, or for

<sup>1</sup> *Saltus vs. Genin*, 3 Bosw. (N. Y.) Conn. 151; *Cousland vs. Davis*, 4 Bosw. (N. Y.) 619; *Monk vs. Graham*, 8 Mod. 9; *Tisdale vs. Harris*, 37 Mass. 9; *Maryland Fire Ins. Co. vs. Dalrymple*, 25 Md. 242; *Freeman vs. Harwood*, 49 Me. 195; *Fisher vs. Brown*, 104 Mass. 259. But see *Neiler vs. Kelly*, 69 Pa. St. 403; *Sewall vs. Lancaster Bank*, 17 Serg. & R. 285; *Biddle vs. Bayard*, 13 Pa. St. 150; *Acraman vs. Cooper*, 10 Mee. & W. 585; *Gorgier vs. Mieville*, 4 D. & Ry. 641; *vs. Colket*, 2 Week. Notes Cas. 322; 33 Leg. Int. 44; *Ayres vs. French*, 41

<sup>2</sup> *Clark vs. Meigs*, 13 Ab. (N. Y.) Pr. 467; s. c. 22 How. 340, rev'g s. c. 12 Ab. Pr. 207, and 21 How. Pr. 187; *Read vs. Lambert*, 10 Ab. Pr. (n. s.) 428.

<sup>3</sup> *Payne vs. Elliott*, 54 Cal. 339; *McAllister vs. Kuhn*, 96 U. S. 87; *Narbring vs. Bank of Mobile*, 58 Ala. 203; *Anderson vs. Nicholas*, 28 N. Y. 600; *Boylan vs. Huguet*, 8 Nev. 345; *Aull vs. Colket*, 2 Week. Notes Cas. 322; 33 Leg. Int. 44; *Ayres vs. French*, 41

214. <sup>4</sup> Ch. III. p. 101 et seq.

a purpose, not authorized, he is liable for a conversion ; but if he parts with it in accordance with his authority, although at a less price, or if he misapplies the avails, or takes inadequate or insufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct.<sup>1</sup> We have already in the third chapter referred to the different acts of Stock-brokers which constitute a conversion<sup>2</sup> of securities held by them on margin for their Clients, and we need not repeat them in this connection. But in Massachusetts, if a certificate of stock in a corporation, pledged as collateral security, is transferred by the pledgee to a creditor of his own, the pledgor may treat this as a conversion, and the fact that the pledgee had a greater number of shares standing to his credit on the books of the corporation is immaterial.<sup>3</sup>

In *Read vs. Lambert*,<sup>4</sup> this principle was applied to United States government bonds ; and it was held that, where such bonds were carried for a Client on margin, the relation of pledgor and pledgee arose, and a sale without authority and without notice was a conversion ; and that in such case it was not necessary for the Client to tender the amount due before bringing suit, as it would be nugatory, though it would be otherwise if the Broker had only pledged the securities in good faith for the amount due him.<sup>5</sup>

A Client's right of action for conversion is not extinguished by his silence upon being informed of the unauthorized sale of his stock, nor by the receipt of a dividend under an assignment made by bankrupt Brokers, unless such dividend was received with the intent to extinguish the claim.<sup>6</sup> In *Mas-*

<sup>1</sup> N. Y. Ct. App., *Laverty vs. Sneath*, 53 How. Pr. 152. See also *Hayward vs. Nat. Bank*, 96 U. S. 611.

<sup>2</sup> Pp. 123, 188 et seq. As to liability of Broker assisting in conversion of stock by Broker, *Gulick vs. Markham*, 6 Daly, 129.

<sup>3</sup> *Fay vs. Gray*, 124 Mass. 500. See also *Hayward vs. Nat. Bank*, 96 U. S. 611.

<sup>4</sup> 10 Ab. Pr. (n. s.) 428.

<sup>5</sup> See also, upon question of demand, cases cited p. 692, note 2.

<sup>6</sup> *Minshall vs. Arthur*, 2 Hun (N. Y.),

sachusetts it has been held that a Broker to whom a certificate of shares has been intrusted with special instructions can make no disposition of them which these instructions do not permit; nor can evidence of a contrary usage be received.<sup>1</sup> But the transfer of stock held as collateral security to avoid liability as a stockholder does not constitute a conversion.<sup>2</sup>

An allegation of value in an action of trover to recover for the conversion of stocks by Stock-brokers is a material allegation, and if not denied need not be proven; and this value, if alleged in the complaint and not denied in the answer, is admitted.<sup>3</sup>

The question as to whether a particular use or disposition of securities by a Stock-broker is a conversion or a mere breach of contract is important in the consequences which flow from the result. For in the State of New York a defendant may be arrested in an action to recover damages for an injury to property, including "the wrongful taking, detention, or conversion of *personal* property;" or in an action to recover "damages for the conversion or misapplication of property, . . ." where such property is fraudulently misapplied by an "agent, Broker, or other person in a fiduciary capacity."<sup>4</sup>

662. But one who has sued for the conversion of stock cannot afterwards sue for dividends subsequently declared thereon (Hughes vs. Vermont Copper Co. 7 Hun, 677).

<sup>1</sup> Parsons vs. Martin, 77 Mass. 111; Wood vs. Hayes, 81 id. 375.

<sup>2</sup> Hiatt vs. Griswold, 5 Fed. Rep. 573; Day vs. Holmes, 103 Mass. 306.

<sup>3</sup> Hixon vs. Pixley, 15 Nev. 475, 483.

<sup>4</sup> §§ 549, 550, subs. 2 & 3, N. Y. Code of Civil Procedure. For cases construing a similar provision of the old Code, see Dubois vs. Thompson, 1 Daly (N. Y.), 309; s. c. 25 How. Pr. 417; Palmer vs. Hussey, 8 Alb. L. J. 206; Clark vs. Pinckney, 50 Barb.

226. But see *McBurney vs. Martin*, 6 Robt. 502, which is probably overruled by *Markham vs. Jaudon*, 41 N. Y. 235; *Lambertson vs. Van Boskerk*, 49 How. (N. Y.) Pr. 266; s. c. 4 Hun, 628. In *Eckert vs. Bellden* (N. Y. Common Pleas, June, 1878, 1 N. Y. *Monthly Law Bulletin*, No. 8, p. 66) it appeared that a check drawn by the Western Union Telegraph Co. upon the Bank of Commerce for the sum of \$30,000, which was the property of the plaintiff, was deposited in his behalf with the defendants for the purpose of collection only. The plaintiff's affidavits declared that the defendants

So the question has arisen as to whether a Broker will be discharged in bankruptcy from such liabilities, and it has been held that a cause of action arising out of the conversion of securities pledged as collateral security is barred by the defendant's discharge in bankruptcy. Such a cause of action is not a debt created by the "fraud . . . of the bankrupt, . . . or while acting in any fiduciary capacity" within the meaning of

were to hold the proceeds as the property of the plaintiff; that they received the amount of the check in money from the bank, and, instead of paying it to the plaintiff, converted it to their own use.

Mr. Justice Daly denied the motion to vacate the order of arrest. He says that the proceeds of the check were to be held by the defendants as a special deposit, but that they did not so hold them, but converted them to their own use, giving the plaintiff credit for the amount with interest. "Money," says the court, "may be the subject of a special deposit, as much as a certificate of stock. . . . The custom among Brokers in this city could in no way affect the contract which the parties entered into for a special deposit. It cannot make a contract different from that which the parties entered into, or which the law would imply from the facts, especially where the plaintiff, as in this case, swears that he had no knowledge of such a custom; that he is not, and never has been, a Stock-broker, and does not know the custom of Stock-brokers in respect to money or securities deposited with them."

In *Meyer vs. Belden* (8 N. Y. Week Dig. 344) it appeared that the defendant, in October, 1878, directed one of the members of the firm of H. & Co., Stock-brokers, to purchase on the following day all the gold he could obtain at or below 101½ and a large number of shares of stock; that the defendant was at the time

a member of the firm of B. & Co., Stock-brokers, and stated to H. & Co. that he directed the purchase for the firm of B. & Co. H. & Co. followed the directions of defendant, and purchased a large amount of gold and stock. The price of the gold and stock did not rise, as was contemplated, but declined. The defendant afterwards claimed he did not order the purchase of the stock, refused to take same, and H. & Co. were obliged to fail, and made a general assignment to the plaintiff.

The affidavits of C. & G., at the time of said alleged order by Belden members of the firm of B. & Co., further showed that defendant stated to them, shortly after the purchase by H. & Co., that he directed H. to make the purchases, but did so on his individual account and not for the firm.

The court below denied the motion to vacate the order of arrest, upon the ground that the order by defendant to H. & Co. was outside the business of the firm and did not therefore bind the firm of B. & Co.; and the statement by the defendant that he was acting for his firm, when in fact he had no such authority, was a fraud upon the plaintiff's assignor, and sufficient facts appeared to uphold the order of arrest. Consult also in this connection the recent case of *Carr vs. Thompson*, N. Y. Ct. App. 25 Alb. L. J. 92, as to when an action against an agent is for fraud or on contract.

the provision of the Bankrupt Act, declaring that such debts shall not be discharged by proceedings in bankruptcy.<sup>1</sup>

Where the bankrupt was a stock and gold Broker, but not a member of the Stock Exchange, and took orders for the purchase and sale of stocks and gold, but conducted the business exclusively through the agency of other Brokers, who were members of the Exchange and divided the commissions with them, held that he was not a merchant or tradesman within the meaning of the Bankrupt Act, and as such disentitled to a discharge for failure to keep books of account.<sup>2</sup>

In respect to a discharge of a cause for conversion, it has been held, however, in an action by a Client against her Stock-brokers, that where the cause of action had once vested by the commission of an act of conversion by illegally selling her stocks without a previous demand of margin, such cause of action would not be discharged except by release under seal, or by payment of something in satisfaction; and that the subsequent acceptance by her of an account with the knowledge of the illegal act, and the payment of the balance apparently due thereon by her to the Brokers, for the purpose of obtaining her bonds which the Brokers held as security, was not a bar to an action to recover damages for such illegal conversion.<sup>3</sup> But the ordinary relation between a Stock-broker and his Client may, as we have seen,<sup>4</sup> be varied by special

<sup>1</sup> U. S. Rev. Stat. § 5117; *Hennequin vs. Clews*, 77 N. Y. 427; *Rowe vs. Guillaume*, 8 N. Y. Week. Dig. 502. See also article on Fiduciary Capacity, 24 Alb. L. J. 424, where a number of cases are collected and reviewed. But bankruptcy and certificate are no bar to an action in tort against a Broker for selling out stock contrary to orders (*Parker vs. Gale*, 5 Bing. 63). See also *Godefroi & Short on Railways*, 10. When notice must be given to an assignee in bankruptcy before suing him for conversion of stock

by the bankrupt, see *Esmond vs. Apgar*, 76 N. Y. 359.

<sup>2</sup> *In re Moss*, 19 Nat. Bank. Reg. 132.

<sup>3</sup> *Stenton vs. Jerome*, 54 N. Y. 480. As to right of Broker to set off counter-claim or recoup in actions brought against him, see Ch. III. p. 200; also *Work vs. Bennett*, 70 Pa. St. 484. Compare *White vs. Jaudon*, 9 Bosw. 415, as to the right of third party to set off debt due from Stock-broker in action brought by principal.

<sup>4</sup> P. 169 et seq.



contract, and instead of pledgor and pledgee they may assume some other position towards each other, in which case the parties might be compelled to bring the action for breach of such special contract.

The case of *Commonwealth vs. Cooper*,<sup>1</sup> is one in which a criminal remedy was invoked against a Stock-broker, and it was there held that where a Client intrusts money to a Broker as a margin on the purchase of shares, and the Broker, instead of making the purchase, converts and applies the same to his own use, he is guilty of embezzlement, and it is no defence to the indictment that the money was to be used in gambling stock transactions.<sup>2</sup>

<sup>1</sup> 15 Am. Law Rev. 360 ; s. c. 130 Mass. 285.

<sup>2</sup> In this case the prosecutor intrusted a sum of money to the defendant, a Stock-broker in Boston, as a margin on the purchase of certain railway stock, and the Broker wrote that he had purchased it of a third party who was carrying the same, that the stock was going up, and advised the prosecutor not to sell; that the latter offered to take the stock and pay the balance of the purchase-money in excess of the margins; but that the defendant confessed that there was no such party; that he had not made any purchase of stock, and that when he received the margins from the prosecutor he was short and put the money with his own funds.

The defendant offered to prove that "upon receipt of an order by the buyer it is the custom for the Broker to assume it himself instead of making it with third parties." But the court refused to admit evidence of this description.

The defendant contended that the contract was a gambling contract, and was illegal under the statute;

and that even if he had appropriated the margin he could not be convicted of embezzlement. The judge instructed the jury that if the money was sent to the defendant to be applied to a particular purpose, and the defendant fraudulently and deceitfully applied it to his own use, it would be embezzlement.

The defendant was found guilty. Upon appeal the verdict was sustained and the rulings of the trial court fully upheld. The court held that, even if there had been an order by the prosecutor to buy stocks on a margin, evidence of the custom contained in the second offer of defendant was inadmissible, and that it was no defence to an indictment for embezzlement to show that the property was intrusted in his hands for an illegal purpose. The court upon this last proposition cited *Commonw. vs. Smith*, 129 Mass. 104.

By Rev. Stat. Ill. 444 (1881), L. 1879, 113, it is provided that Bankers and Brokers receiving deposits of stocks, bonds, etc., when insolvent, shall be guilty of embezzlement.

*(f.) Liability of Clients to their Own Brokers.**1. General Indemnity.*

We have also seen, in the third chapter,<sup>1</sup> that where a Stock-broker acts in pursuance or under the directions of his Client he is entitled to an indemnification from his principal the same as any other agent; and the different cases which illustrate this rule have been particularly noticed.<sup>2</sup> It is only necessary, in this connection, to consider the form of the remedy by which this liability of the Client to the Broker may be established and enforced.

As there is an implied contract that the principal will indemnify his agent for all losses sustained while acting for or in his behalf, it follows that the action of *assumpsit* furnishes a most appropriate remedy for the recovery from the Client of all losses which the Broker has paid out, suffered, or incurred in his Client's behalf. And this recovery may be had either in an action brought for violation of this implied agreement, in which case the loss suffered or the amount paid would furnish the measure of damages to be awarded,<sup>3</sup> or it may be had in the more popular form of money paid by the Broker at the request of the Client.<sup>4</sup>

To recover his commissions, the Broker may declare in *assumpsit*, on the *indebitatus* count, for work, labor, and services.<sup>5</sup>

<sup>1</sup> P. 123 et seq.

<sup>2</sup> *Id.* See also *Stocking vs. Sage*, 1 Conn. 522; *Powell vs. Newburg*, 19 Johns. 284; *Adamson vs. Jarvis*, 4 Bing. 66.

<sup>3</sup> *Ante*, p. 123 et seq.; *Lacey vs. Hill* (*Crowley's Claim*), 43 L. J. Ch. 551; 22 W. R. 586; L. R. 18 Eq. 182; *Biederman vs. Stone*, 36 L. J. 1 C. P. 198; s. c. L. R. 2 C. P. 504.

<sup>4</sup> *Mortimer vs. McCallan*, 6 Mee. & W. 58; *Hearne vs. Keene*, 5 Bosw.

584; *Whitehouse vs. Moore*, 13 Ab. Pr. 142; *Merwin vs. Hamilton*, 6 Duer, 244.

<sup>5</sup> *Merwin vs. Hamilton*, 6 Duer, 244; *Knight vs. Cambers*, 15 C. B. 562; *Same vs. Fitch*, id. 566; *Gibson vs. Crick*, 1 Hurl. & C. 142; *Allan vs. Sundius*, id. 123. Requisites of complaint in action by Gold-broker for money laid out, etc., in transactions in gold for account of Client, *Scheepeler vs. Eisner*, 3 Daly (N. Y.), 11.

2. *Banker's Lien.*

Stock-brokers frequently act as bankers, in which case they have an additional remedy through the instrumentality of what is known as a "banker's lien;" and, as will be seen hereafter,<sup>1</sup> it appears by analogy that the Stock-broker, when he acts in that capacity singly, has also the right to invoke this lien for his protection.

We shall first examine the nature of a banker's lien, and then consider how far the principles upon which it rests apply to the relation of a Stock-broker.

The established rule is that bankers have a general lien upon all notes, bills, and other securities deposited with them by their depositors for the balance due to them on general account.<sup>2</sup> The true principle upon which all banker's lien must be sustained is that there must be credit given upon the credit of the securities, either in possession or in expectancy.<sup>3</sup> The term "securities," as used in respect to a banker's lien, is limited to promissory notes, bills of exchange, exchequer bills, coupons, bonds of foreign governments, etc.; and does not, in the absence of special agreement, apply to a deed of lands in the Banker's hands.<sup>4</sup> The general lien of bankers is part of the law-merchant, and will be judicially noticed by the

<sup>1</sup> P. 711.

<sup>2</sup> Story on Agency, § 380; Wharton on Agency, § 688; Morse on Banking, 42; Davis vs. Bowsher, 5 T. R. 488; Bolton vs. Puller, 1 Bos. & P. 539; Bolland vs. Bygrave, 1 Ry. & M. 271; Jourdain vs. Lefevre, 1 Esp. 66; Scott vs. Franklin, 15 East, 428; Brandao vs. Barnett, 12 Cl. & F. 787. And the lien has been held to extend to moneys on deposit (Ford vs. Thornton, 3 Leigh, 695; State Bank vs. Armstrong, 4 Dev. (N. C.) 519). But the deposit of money with a bank creates the rela-

tion of debtor and creditor; the money is the money of the bank, and there would seem to be no place for the doctrine of lien (Dawson vs. Real Estate Bank, 5 Pike (Ark.), 283; Marsh vs. Oneida Bank, 34 Barb. 298; Fourth Nat. Bank of Chicago vs. City Nat. Bank of Grand Rapids, 68 Ill. 398). Pledged property cannot be held for general lien (Duncan vs. Brennan, 83 N. Y. 487).

<sup>3</sup> Russell vs. Hadduck, 3 Gilm. 233.

<sup>4</sup> Wylde vs. Radford, 33 L. J. Ch. 51.

courts without proof of the usage upon which the same is founded.<sup>1</sup>

The general rule is that the lien extends to all the securities deposited with the banker where they are not so deposited for some specific purpose. But this rule is subject to modification by certain circumstances, and the cases cited in the notes fully illustrate this proposition.<sup>2</sup>

The rights of a banker in respect to securities in his hands have been held to go even beyond the mere right of lien; for when his acceptances exceed the cash balance he is a holder of such securities for value,<sup>3</sup> and, as endorsee of the bill or other security, may bring an action on the same.<sup>4</sup>

So where a check payable to bearer is paid in by a depositor on his general account, although not credited to him as cash, the banker takes the legal as well as equitable title to the check, and may sue upon the same.<sup>5</sup> But where the party sued and sought to be made liable on the bill or

<sup>1</sup> *Brandao vs. Barnett*, 12 Cl. & F. 787; *Story on Agency*, § 375; *Jones vs. Peppercorne*, 5 Jur. (n. s.) 140.

<sup>2</sup> Where the course of dealing between bankers and their depositor was that the customer lodged bills payable at a future day with the bankers from time to time, and drew upon them for any money he wanted in advance, and the bankers used to select out of the bills in their hands such as they pleased and were nearest to the sum advanced, and discounted these bills, debiting the depositor with the amount of such discount in his account, it was held that the bankers had a lien on all the bills so deposited with them, and that they might hold the bills that were not discounted until the general balance was paid (*Davis vs. Bowsher*, 5 T. R. 488). And the bills and notes so deposited may be held until other bills not yet due, and

upon which the banker is liable, are paid (*id.*; *Bolland vs. Bygrave*, 1 Ry. & M. 271; *Jourdaine vs. Lefevre*, 1 Esp. 66). And even where the balance is in favor of the depositor, if that balance does not equal in amount any one of the bills or other securities held by the bank, the bank may retain all (*Bolland vs. Bygrave*, *supra*). And where the banker sues on any one of such securities, the customer cannot set off such balance, for the court cannot say that any one acceptance in particular shall have the benefit of this surplus (*id.*). It makes no difference that the banker keeps a cash and discount account; both are regarded as parts of the general account, for which the banker has his lien (*Jourdaine vs. Lefevre*, 1 Esp. 66).

<sup>3</sup> *Bosanquet vs. Dudman*, 1 Stark. 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Scott vs. Franklin*, 15 East, 428.

other security defends the action on behalf of the depositor, then the banker can only recover on the instrument the amount of the balance in his favor on the account, and not the face of the bill or other security.<sup>1</sup> So where a banker, in the course of dealings with a depositor who has become bankrupt, makes advances to the latter, and accepts and discounts bills for him, and the depositor remits bills to the banker from time to time, any acceptances of the banker not due at the time of the bankruptcy are a good consideration, and give the banker a right to prove upon the bills deposited, but not due till after the bankruptcy. The proof must be upon the bills, and not as a cash balance.<sup>2</sup>

So where bankers allowed the firm of M. & W., their depositors, to overdraw their account, and M. gave the bankers his individual note for £2000 as collateral security, and W. gave his individual note for £1000 to M., who transferred it to the bankers, it was held that the bankers might sue and recover on the note of W.<sup>3</sup>

A bank discounted a note for a depositor for his accommodation, who died before the note matured—held, that the bank might retain sufficient of his cash deposit to meet the maturing note. The bank is a debtor to the depositor's estate only to the extent of the balance of the deposit in excess of the note; and this is so although there are debts against the depositor's estate of superior dignity which are not paid.<sup>4</sup> And if the depositor in his lifetime sues the bank to recover his deposit, though he could not set off at law because his note was not due, yet, upon showing in a court of equity that the depositor and his endorsers were insolvent, there can be no question of the right of the bank to stop the amount in its own hands.<sup>5</sup>

<sup>1</sup> Scott vs. Franklin, 15 East, 428. 496. See also cases cited in Swift

<sup>2</sup> Ex parte Bloxham, 8 Ves. 531. vs. Tyson, 16 Pet. 21, 22.

<sup>3</sup> Heywood vs. Watson, 4 Bing. <sup>4</sup> Ford vs. Thornton, 3 Leigh, 695.

<sup>5</sup> Id.

Where, however, a bank retains a cash balance in its hands in respect to any claim which it has against its depositor, it is more properly an appropriation of payments than an exercise of a right of lien. If the claim against the depositor is so connected with the balance appearing due on open account that both are items in a continued dealing, then the retention of the cash balance is rightful, because in truth there is nothing due. If, however, the mutual claims of bank and depositor are unconnected, then the bank may refuse to pay over the cash balance, because it is a proper subject of set-off.<sup>1</sup>

The cash balance created is still the money of the bank, and it may apply it at its election to any claim against the depositor which it may have; and it is not the right of the depositor to make the appropriation.<sup>2</sup> But where the maker of a note has funds in the bank on general deposit after the note falls due, the bank is bound to apply them in payment of the note, or the endorser is discharged.<sup>3</sup> Where money paid into a bank is passed generally to the credit of the owner, the bank does not hold it as bailee, but as owner; and it may appropriate the deposit to any claim it may have against the depositor.<sup>4</sup> There would seem to be no lien in such cases. But if a bank receive a deposit of funds for the special purpose of paying certain coupons, it cannot apply such funds to the payment of another account which the depositor has overdrawn, and thus defeat the right of the holders of such coupons to receive payment of the same.<sup>5</sup> A bank cannot apply the balance of deposit to the payment of a note maturing in its hands, where it makes such appropriation of payment after the depositor has made an assignment for the benefit of creditors. Upon the execution of the assignment the balance due

<sup>1</sup> *State Bank vs. Armstrong*, 4 Dev. (N. C.) 519.

<sup>2</sup> *Id.*

<sup>3</sup> *McDowell vs. Bank of Wilmington*, 1 Harr. 369.

<sup>4</sup> *Commercial Bank vs. Hughes*, 17 Wend. 94.

<sup>5</sup> *Bank of U. S. vs. Macalester*, 9 Pa. St. 475.

the depositor becomes the money of the assignee, and it is then too late to apply it to the payment of the maturing bill.<sup>1</sup>

The rule as laid down by Morse on Banks, "that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account," is too broadly stated, and needs the limitation that the balance of that account must be due and payable.<sup>2</sup> Thus a bank has no right to retain the balance of a deposit to apply the same to the payment of a note not yet matured.<sup>3</sup> But the bank need not apply the deposit to the payment of a note in its hands for which the depositor is liable immediately upon the maturity of the note, but may prosecute the note to judgment, and then make the application. And if the depositor sue for his deposit, the bank may then set off the judgment.<sup>4</sup>

Where a banker holds a note of a depositor who has on deposit with the latter sufficient funds to pay it, and the banker makes an assignment for the benefit of creditors before the note matures, the depositor, in an action brought on the note by the assignee, may set off the sum due him against such note.<sup>5</sup>

Where a bank holds a note of a depositor which has been protested for non-payment, and subsequently the depositor makes a general deposit of money sufficient to pay the note, such deposit, without regard to the note, does not operate as payment. It is optional with the bank whether it shall apply such deposit to the payment of the note or not; and its failure to do so does not discharge the endorser.<sup>6</sup>

In the case of *Duncan vs. North and South Wales Bank*,<sup>7</sup>

<sup>1</sup> *Beckwith vs. Union Bank*, 4 Sandf. 604, 9 N. Y. 211.

<sup>2</sup> *Jordan vs. National Shoe and Leather Bank*, 74 N. Y. 467.

<sup>3</sup> *Id.*

<sup>4</sup> *Marsh vs. Oneida Central Bank*, 34 Barb. 298.

<sup>5</sup> *McCagg vs. Woodman*, 28 Ill. 84.

<sup>6</sup> *National Bank vs. Smith*, 66 N. Y. 271.

<sup>7</sup> 27 W. R. 521.

one of a firm deposited with the firm's bankers securities belonging to himself, to secure the general balance of the firm for the time being. The firm subsequently accepted certain bills in favor of the plaintiffs, who procured the bankers to discount them. Upon the insolvency of the firm the plaintiffs claimed that the securities held by the bankers must be applied in discharge of the sums due on the bills. The plaintiffs claimed that they were mere sureties (the firm being the principal debtors), and were entitled to contribution, and the vice-chancellor sustained this claim. The Court of Appeal reversed this decision, holding that it could not be tolerated; that without the consent of the bankers, or their knowledge of the real position of the other parties, the plaintiffs should be treated as sureties, so as to prevent the bank from dealing in their own way with the securities they held. "No bank," said the Master of the Rolls, "which held a security, either by way of suretyship or by way of deposit from its customers, could venture to discount a bill with eight or ten names on it, without examining carefully to see if any one of the names was the name of a debtor to the bank who had given them security; and, if they did, they might be put in the position of being incapacitated from carrying on their dealings with their customers by varying the securities given by that customer to the bank. It shows at once that to extend the doctrine to such a case would paralyze the business of discounting bills of exchange, and that it would be unwise, as far as this court is concerned, to extend for the first time the doctrine of principal and surety, which for certain purposes extends to bills of exchange, to such a transaction as this. On this ground alone I think the decision cannot be supported."<sup>1</sup>

<sup>1</sup> Compare *Gilbert vs. Marsh*, 12 *Hazard vs. Wells*, 2 *Ab. New Cas.* 144; *Hun*, 519; *Cory vs. Leonard*, 56 *N. Y.* *Wood vs. Sheehan*, 68 *N. Y.* 365; also, 494, *aff'g* 1 *Sup. Ct. (T. & C.)* 183; *Gray vs. Green*, 12 *Hun*, 598, *rev'd* 77 *Meehan vs. Forrester*, 52 *N. Y.* 277; *N. Y.* 615.



Where securities are deposited with a banker to secure a specific sum, he cannot hold them to secure his general balance.<sup>1</sup> The depositor, or his representatives, may redeem the securities by paying the special sum which they were given to secure.<sup>2</sup> The general rule of law relative to pledges is that a former debt due to the pledgee, or a subsequent debt contracted by the pledgor, does not authorize the pledgee to retain a pledge given for another demand, unless, from all the circumstances, there is just ground of presumption that this was the intention of the parties.<sup>3</sup> And if securities upon which a banker has declined to loan money are casually left at his banking-house, they cannot be retained by him as security for his general balance.<sup>4</sup>

Security given by a depositor to his bankers to cover a balance then existing against him is not to be deemed a security for a floating balance. Accordingly, where a depositor kept three several accounts with his bankers—a private account, a partnership account, and an executorship account—which were all overdrawn, and to secure the same charged his estate with the payment “of the three several sums of money which shall or may be found due on the balance of the said several accounts,” it was not a security for “such balance which shall from time to time become due.”<sup>5</sup>

Where the deposit of a deed of conveyance was for the special purpose of giving a security upon one of the pieces of property described in such deed, it was held that the bankers could claim no general lien, by the custom of bankers, upon another piece of property described therein.<sup>6</sup>

<sup>1</sup> *Duncan vs. Brennan*, 83 N. Y. there cited; *Duncan vs. Brennan*, 487. supra.

<sup>2</sup> *Vanderzee vs. Willis*, 1 Bro. C. C. <sup>4</sup> *Lucas vs. Dorrein*, 7 Taunt. 279;  
21; *Gould vs. Farmers' Loan & Trust* *Mountford vs. Scott*, 1 Turn. & R.  
Co. 23 Hun, 322; *Same vs. Central* 274.

*Trust Co.* 6 Ab. New Cas. 381. <sup>5</sup> *Re Medewe's Trust*, 26 Beav. 588.

<sup>3</sup> *Story on Bailments*, 304, and cases <sup>6</sup> *Wylde vs. Radford*, 33 L. J. Ch. 51.

“As between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account, and it is not open to the customer, in the absence of some special contract, to say that the securities which he deposits are only applicable to one account.” Thus, where the O. C. Bank had three accounts with the A. and M. Bank—namely, a loan account, a discount account, and a general account—and the O. C. Bank were in the habit of applying to the A. and M. Bank for accommodation loans of considerable amount, which were entered in the loan account, and they from time to time deposited securities to meet these loans, and, having drawn upon the A. and M. Bank for a large sum, deposited with them three accommodation acceptances of the E. Bank by way of collateral security, the A. and M. Bank claimed a lien on these acceptances, so far as they were not required to cover the balance of the loan account, for the deficiency in the general account—which was allowed against the E. Bank in the winding-up of the same.<sup>1</sup>

But if a depositor keep two separate accounts with his banker, but not in a separate character, he may offset one account against the other. The corporation of P. kept three separate accounts with plaintiff's banking-house—viz., the “corporation account,” the Board of Health account, and the bath and wash-house account. The corporation was debtor on the corporation account, but a creditor on the last two accounts, and sought to set off the same. The court held that the corporation of P. was the same person who owed the money and to whom the money was owing, and therefore the set-off was allowed.<sup>2</sup>

Where the securities are placed in the hands of the banker for some special and particular purpose, the lien does not at-

<sup>1</sup> In re European Bank, L. R. 8 Ch. App. 41.

<sup>2</sup> Pedder vs. Preston, 9 Jur. (n. s.) 496.

tach. Thus where B., who acted as agent for a foreign correspondent, took certain exchequer-bills from a tin box which he kept at his bankers', and gave them to the bankers to be exchanged for other bills and to collect the interest, which they were in the habit of doing in respect to such bills, and before B. came to take back the exchequer-bills and return them to his box the bankers paid certain acceptances of B. which exceeded the balance of his account, and he subsequently became bankrupt, it was held that the bankers had no lien on the exchequer-bills for their balance of account, and that the owner of the bills, the principal of B., could recover.<sup>1</sup>

Securities given to the bank for a fixed and definite sum are not to be treated as securities for the balances of the banking account which may become due from time to time. And the account in respect to such securities must be kept separate from the general banking account, and interest cannot be compounded as in the general account.<sup>2</sup>

Where a depositor keeps a private account with his bankers, and also a trust account, and he pays moneys into his separate account from the trust account, with the knowledge of the bankers, the bankers cannot retain such moneys against the parties entitled to the same.<sup>3</sup> The rule is, that where the security deposited by the depositor to cover any balance against him is subject to a trust, such trust must prevail as against the banker's lien, although the banker had no notice of such trust being attached to the security; <sup>4</sup> but the consent or acquiescence of the *cestui que* trust might alter the case.<sup>5</sup>

And where a trustee, holding certain shares in trust, enters into an agreement with a bank to transfer to it such shares as

<sup>1</sup> Brandao vs. Barnett, 12 Cl. & F. 787.

<sup>2</sup> Mosse vs. Salt, 32 Beav. 269; Grant vs. Taylor, 3 J. & S. (N. Y.) 338.

<sup>3</sup> Bodenham vs. Hoskyns, 2 De G. M. & G. 903.

<sup>4</sup> Manningford vs. Toleman, 1 Coll. 670.

<sup>5</sup> Id. See also Lord Bolingbroke's Case, 1 Sch. & Lef. 346.

collateral security for a loan, the equity of the *cestui que* trust will prevail over that of the bank, and it cannot retain the same to cover its advances.<sup>1</sup>

If the trustee sell the original trust shares, and subsequently to such sale deals in the same kind of shares on his own account, and if at any time when he is called upon to account for such shares he is found in possession of similar shares, although not the original trust shares, he will be considered as trustee to the extent of the number of shares he is bound to have in his possession as such trustee; and he will be so held against the claim or lien of the bank.<sup>2</sup>

So where a trustee deposits with his bankers mortgage deeds which he holds in trust to secure a loan to him individually, the bankers have no lien on the same, unless the *cestui que* trust have been guilty of negligence. And where a trustee invested trust funds in a mortgage which he took in his own name, and in which mortgage other moneys were invested not included in the trust fund in question, the court held that it was not negligence in the *cestui que* trust to leave the mortgage deed in the hands of the trustee, they holding a written declaration of trust outside of the mortgage. The trustee, as such, probably had a right to hold the deed, especially as the mortgage covered some of his own money.<sup>3</sup>

In the case of *Jones vs. Peppercorne*,<sup>4</sup> Vice-chancellor Wood held that where securities were left with a banker for safe custody, and he fraudulently deposited them with his Broker as security for advances made to him, the Broker might hold them as against the true owners until their lien for a general balance of account was satisfied. In this case, however, the bonds were payable to order.<sup>5</sup>

<sup>1</sup> *Murray vs. Pinkett*, 12 Cl. & F. 764.      sey, 30 L. J. Ch. 421. See also *Roberts vs. Croft*, 24 Beav. 223.

<sup>2</sup> *Id.*

<sup>3</sup> *Stackhouse vs. Countess of Jer-*

<sup>4</sup> 5 Jur. (n. s.) 140.

<sup>5</sup> The following cases illustrate

Where a depositor of a bank authorizes a trustee of a fund of which he is a *cestui que* trust to pay to the credit of his account with the bank moneys that are coming to him from the trust, the bank acquires a good lien, which is not counter-mandable.<sup>1</sup>

And a country banker sending bills to his London agent, endorsed generally to receive payment of them, the bills, on the bankruptcy of the country banker, are not lost to the owners of them, but the London banker has a lien upon them for any balance due from the country banker.<sup>2</sup>

And a depositor, remitting bills to his bankers to meet acceptances which the bankers fail to pay, may recover the bills or their proceeds from the bankers or their assignee, subject to any lien upon the same which the bankers may have.<sup>3</sup>

A bank receiving a bill for collection, so endorsed that they have notice that the parties sending it only held it for collection, cannot retain out of the proceeds for a general balance due the bank from the party from whom they so receive the same. And an endorsement, "Pay J. L. & Co., or order, for collection," is sufficient notice.<sup>4</sup>

Whether deposits are intended as security for a general balance must be, to a great extent, a matter of evidence. Previous dealings between the parties is of importance as showing the true intent.<sup>5</sup>

Where there is an account between a firm and the bank, and another account with one particular member of the firm, the bank has no lien upon the balance due upon the separate account of the individual partner for a balance due to the

this question still further: *Frazer Walker*, 2 W. Bl. 1154 (note), 9 East, vs. *Jones*, 17 L. J. Ch. 353; *Joyce vs.* 13.  
*De Moleyns*, 2 Jo. & Lat. 374.

<sup>1</sup> *Ex parte Steward*, 3 Mont. D. & D. 265.

<sup>2</sup> *Ex parte Froggatt*, 3 Mont. D. & D. 322.

<sup>3</sup> *Zinck vs. Walker*, *supra*.

<sup>4</sup> *Cecil Bank vs. Farmers' Bank of Maryland*, 22 Md. 148.

<sup>5</sup> See *Grant vs. Taylor*, 3 J. & S. (N. Y.) 349.

bank from the firm.<sup>1</sup> And where a firm is sued by the bank to recover a balance due it, the firm cannot set off a balance of account due from the bank to an individual partner.<sup>2</sup> And although the individual partner, between the time of the suspension of the bank and its bankruptcy, assigns his balance of account to his firm, and directs the bank to place such balance to the account of the firm, such assignment will not enlarge or change the right of lien or set-off.<sup>3</sup>

So if an individual member of a firm deposits securities with the bank to secure his separate indebtedness to it, and transfers such securities to his firm subsequent to their bankruptcy, the bank has no lien upon the securities for a debt due it from the firm.<sup>4</sup> Although bankers may safely advance money upon the security of stock or shares deposited with them by any one, where the bankers have not notice or reasonable cause to believe that the stock or shares belong to another, yet when they receive notice that such stock or shares belong to another person, the stock or shares can then only be a security for the balance due to them at that period. Thus, where the person making the deposit of the stock upon which the bankers made a loan wrote to the bankers that they had been requested by their "principal" to extend the time of the loan on the stock, it was held that this gave the bankers notice that the stock belonged to another.<sup>5</sup>

Where a special contract is made inconsistent with a right of lien, as where a solicitor takes time-notes for his services, the lien is good.<sup>6</sup> "If a security is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone."<sup>7</sup>

<sup>1</sup> *Watts vs. Christie*, 11 Beav. 546.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Ex parte M'Kenna*, 80 L. J. Bank. 20.

<sup>5</sup> *Locke vs. Prescott*, 32 Beav. 261.

<sup>6</sup> *Cowell vs. Simpson*, 16 Ves. 275.

On the above point, see the cases cited in note to this case.

<sup>7</sup> *Hewison vs. Guthrie*, 3 Scott, 311.

Where one having a lien upon a chattel in his possession, upon its being demanded by the owner, does not disclose his lien, but claims to be the owner, he is estopped from setting up his lien in an action to recover possession.<sup>1</sup>

### 3. *Stock-broker's Lien.*

An agent generally has a lien upon the property committed to his care for all his commissions, expenditures, advances, and services made and performed in and about the property so intrusted to his agency; and Stock-brokers, being a well-known class of agents, come within the operation of this rule.<sup>2</sup> The position of a Stock-broker buying stocks on a margin is very similar to that of a factor who holds property consigned to him for sale, and upon which he makes advances. He is in possession of the property of his principal, he has all the *indicia* of title, he can sell the stock in his own name, and when he sells he can retain his advances from the proceeds. The relation of pledgor and pledgee exists, as in the case of factors. He may sell upon notice to secure his advances, where the margin is not made good. And he may even repledge the stock for his own debt to a third person.<sup>3</sup> So that a Client may often invest the Broker with the office of a factor. And if an analogy between the many rights and duties of a Stock-broker, purchasing stock on margin, and an ordinary factor, were sufficient to establish the right of a general lien, then it would seem that it might well be allowed to exist. But where the Broker advances the money to pay for the stock which he is employed to purchase, he stands in the position of pledgee of the stock so purchased, and may hold the same till his advances are paid, as we have seen in another connection. And in such a case he would have a lien for his commission also.<sup>4</sup>

<sup>1</sup> Maynard vs. Anderson, 54 N. Y. 641.

<sup>2</sup> Story on Agency, §§ 373-375.

<sup>3</sup> Wood vs. Hayes, 81 Mass. 375.

<sup>4</sup> Hoy vs. Reade, 1 Sweeny, 626.

Mr. Story, on this subject, says: "When a Broker is intrusted with negotiable notes endorsed in blank, for sale, he becomes rather a factor than a Broker; for he is then intrusted with the disposal and control of them, and may, by his negotiation, pass a good title to them. A Broker is often both a factor and Broker. When a Broker becomes possessed of the thing about which he is employed, he acquires, equally with a factor, a lien for his commissions—as, for example, an insurance Broker having possession of a policy."<sup>1</sup>

Liens are either particular or general; the former being limited to what is due in respect to services performed in some particular matter, the latter extending to what is due on a general balance of account.<sup>2</sup> Particular liens arise either by operation of law or by express contract, or by an implied contract growing out of the usage of trade, or from the previous dealings between the parties. General liens are not favored in law, and consequently only arise out of either of the two last-mentioned sources—viz., special contract or usage.<sup>3</sup> The instances in which liens arise by operation of law are special, and very few in number. Liens at common-law were first allowed where some duty was imposed by law to receive the goods upon which the lien is claimed, as in the case of carriers or innkeepers; or where the lienee had at his peril, labor, and expense, rescued the goods from loss at sea, as in the case of salvors.<sup>4</sup> Thus auctioneers have been allowed to have a lien for their charges, because of their duty to take the goods into their possession.<sup>5</sup>

<sup>1</sup> Story on Agency, § 34, n. 3. See also *McKenzie vs. Nevius*, 22 Me. 138; 2 Chit. on Com. and Manf. 210, 211, 541; *Blunt's Com. Dig.* ch. 15, p. 230; 1 Bell Comm. 386 (see 409, 4th ed.); id. 478 (5th ed.).

<sup>2</sup> Story on Agency, § 354.

<sup>3</sup> Id. 355.

<sup>4</sup> 3 Parsons on Contracts, 235; *Hutchins vs. Olcott*, 4 Vt. 549; *Grinnell vs. Cook*, 3 Hill, 485; *Rivara vs. Ghio*, 3 E. D. Smith, 264.

<sup>5</sup> *Williams vs. Millington*, 1 H. Bl. 81; commented upon and explained in *Steadman vs. Hockley*, 15 M. & W. 553.



Liens at common-law were afterwards extended to the case of tradesmen and artisans to whom goods were delivered to perform some service upon them for their alteration or improvement.<sup>1</sup> And the benefit of this right has been claimed and allowed by many trades which were unknown to the common-law.<sup>2</sup> And if Stock-brokers have a lien at common-law for their commissions, it must be by extending this tradesman's or artisan's lien to their business.<sup>3</sup>

But, irrespective of apparent exceptions, the prevailing doctrine appears to be that no lien attaches except where work is to be done on a chattel to *improve it*, or to *increase its value*; but where it is merely delivered to a person to do anything with it or in respect of it, the lien cannot be supported.<sup>4</sup>

In the case of *Steinman vs. Wilkins*,<sup>5</sup> a much more liberal view of the scope and application of the law of particular liens was taken than in any of the above cases; and the restricted doctrine, that the service or disbursement must be such as to add to the value of the thing in respect to which the right of lien is claimed, is criticised and disapproved. In the above case it was held that a warehouseman has a specific, not a general, lien; but he may deliver a part and retain the residue for the price chargeable on all the goods received by him under the same bailment, provided the ownership of the whole is in the same person.

<sup>1</sup> Story on Agency, 353; *Bevan vs. Waters*, 3 C. & P. 520; *Scarfe vs. Morgan*, 4 Mee. & W. 270; *Jackson vs. Cummings*, 5 id. 342; *Judson vs. Etheridge*, 3 Tyrw. 954; *Hutchins vs. Olcutt*, 4 Vt. 549; *Grinnell vs. Cook*, 3 Hill, 485.

<sup>2</sup> *Hutchins vs. Olcutt*, supra.

<sup>3</sup> See cases cited supra, note 1, and *Morgan vs. Congdon*, 4 N. Y. 552; *Wil-*

*son vs. Martin*, 40 N. H. '88; *Steadman vs. Hockley*, 15 M. & W. 553; *Sanderson vs. Bell*, 2 Crompt. & M. 304; *Pinney vs. Wells*, 10 Conn. 115; *Blake vs. Nicholson*, 3 Mau. & S. 168; *Crawshay vs. Homfray*, 4 Barn. & Ald. 50.

<sup>4</sup> This is well illustrated in the case of *Sanderson vs. Bell*, supra.

<sup>5</sup> 7 W. & S. 466.

But where Brokers act as bankers and make advances on securities deposited with them, they not only have a lien on such securities for the money advanced, but also for a general balance of account. Such, at least, is the practice among Brokers on the London Stock Exchange.<sup>1</sup>

In the last-mentioned case, the testimony of a Broker to the Court of Chancery in respect to the practice among Brokers on the London Stock Exchange in relation to the subject of lien was as follows: "Where lenders or other Brokers hold securities deposited by the same borrowers at several times and on distinct occasions, and choose to close their account, or their account is closed by circumstances, such as the borrowers stopping payment, the lenders have a lien upon all the borrowers' securities in their possession until the balance due to them from the borrowers on every account is paid, and they have the right to sell a sufficient portion of the securities to cover any such balance. In fact, all securities in the hands of the lender at the time of closing an account are applicable not only to the particular sum advanced at the time of the deposit of particular securities, but to whatever balance may be due from the borrower to the lender at the time that the account is closed." Similar evidence was given in the same case by other eminent Brokers. And the court said: "Indeed, it would appear that the court would require no evidence of the practice of Brokers in this respect, considering it as settled."

A party who holds stock of the bankrupt as collateral for a certain debt, which was over-due at the commencement of the proceedings in bankruptcy, may, if he has the power to sell the stock, retain the surplus by way of set-off on another claim which he holds against the bankrupt. When one partner pledges his property as security for a firm debt, the cred-

<sup>1</sup> Jones vs. Peppercorne, 5 Jur. (n. s.) 140.

itor may prove his full claim against the firm without a valuation of the securities.<sup>1</sup>

In the case of *Jones vs. Peppercorne*, the court seems to place a Broker who also acts as a banker for his Client in loaning money on securities in the same category with bankers themselves in respect to the right of lien.

In the case, however, of *Grant vs. Taylor*, in the Superior Court of the City of New York,<sup>2</sup> it was held that only "bankers" who are strictly such, and who are dealers in money, have a general lien for a balance of account; and that where a firm of bankers and Brokers, who, as in that case, advanced money to their Clients on bills of exchange, claimed a general lien, it must be proved.

So where a Broker has obtained a loan for his principal, and holds certain chattels as security therefor, he cannot, in the absence of a special agreement, appropriate the proceeds of said chattel to the payment of a debt due to him by the principal.<sup>3</sup>

In conclusion, it will be observed that there are very few, if any, direct cases where the naked question has arisen as to whether a Stock-broker has a lien for his commissions or general balances, where he has done nothing more than purchase the securities with the money of his Clients; but the tendency of the decisions has been to extend this general lien rather than to restrict it. Where he advances his own money in the purchase of securities, it is clear that the Broker has such lien.

## *II. Specific Performance.*

### *(a.) Preliminary Observations.*

We shall confine our consideration of this topic to those cases which arise out of transactions in securities. The cases

<sup>1</sup> Ex parte Whiting, 14 Nat. Bank Reg. 307.

<sup>2</sup> 3 J. & S. 338.

<sup>3</sup> James's Appeal, 89 Pa. St. 54.

rarely, if ever, occur between Broker and Client, but generally between parties who bear towards each other the relation of vendor and vendee, and perhaps more frequently between the latter party and corporations in which he may have purchased shares. In considering this class of decisions, we naturally look to the English adjudications, as they contain the earliest rules and enunciations of courts of equity upon the subject.

During a period of over a century and a half, these courts have made numerous and important rulings as to the specific execution of contracts for the sale or transfer of stock and shares, some of which, however, it is difficult at times to reconcile with the later cases.

The difference between the English and American courts upon this branch of the law, especially in its application to stock and shares, would seem to be based mainly upon several considerations, which it may not be amiss to notice—and first, upon the fact that stock transactions in the mother-country are regulated by a system or custom among Brokers of doing business on the Stock Exchange, which system, as has been already shown, is entirely different from that prevailing among Stock-brokers in the United States, and which is directly involved when questions arise as to the liability of stockholders in corporations or joint-stock companies for “calls” or assessments;<sup>1</sup> second, in England a radical distinction exists between “stock” and “shares;” and while the specific performance of contracts embracing the latter class may and will be decreed by the courts in a proper case, a different rule generally applies to the former kind of securities, as to which it has been and is the constant practice of courts of equity to

<sup>1</sup> Most of these bodies are created decisions thereon, in *Brown & Theodore's Law of Railways* (London: under the Companies Act of 1862. See these laws in full, with notes of 1881).

send an aggrieved party to courts of law for pecuniary damages.<sup>1</sup>

The distinction which is made between "stock" and "shares"<sup>2</sup> in England is this: the former term is held to apply to government and other public securities, which, being numerous, are of course always easily to be procured in the open market; while the term "shares" is said to include the stock of private corporations, chartered companies, joint-stock associations, and railways, the stock of which is often, if not generally, limited in quantity, and is in consequence more difficult to be obtained.<sup>3</sup> Hence the necessity sometimes arises for equitable interference where the latter class of securities is concerned.<sup>4</sup>

#### (b.) *General Rule.*

The general rule is that this remedy is not obtainable in equity where damages at law will afford adequate or just relief. In England this rule has been generally applied to government and other public stocks, as we have already stated, from the earliest times.<sup>5</sup> When the subject is fairly consid-

<sup>1</sup> *Duncuft vs. Albrecht*, 12 Sim. 189; *Colt vs. Netterville*, 2 P. Wms. 305.

<sup>2</sup> See *Ross vs. Union Pac. R. R. Co.* 1 Woolw. (U. S. Circuit Ct.) 26, 32.

<sup>3</sup> See this distinction stated in *Cavanagh's Law of Money Securities*, 495-503.

<sup>4</sup> *Duncuft vs. Albrecht*, *supra*. See *Ashe vs. Johnson*, 2 Jones Eq. 169, where the like rule seems to be laid down. But a bill will lie for specific performance of an agreement to purchase foreign government stock when it *prays delivery of the certificates* which give legal title to the stock (*Doloret vs. Rothschild*, 1 Sim. & S. 590; s. c. 2 L. J. Ch. 125). The rule appears to be applied in California (*Hardenbergh vs. Bacon*, 33 Cal. 356). But see *Nutbrown vs. Thornton*, 10 Ves. 161; *Mason vs. Armitage*, 13 id. 37.

<sup>5</sup> *Chit. Pr.* (1st Am. ed.) 853; *Story Eq. Jur.* § 724; *Adderly vs. Dixon*, 1 Sim. & St. 610; *Brunswick Co. vs. Muggeridge*, 4 Drew. 698; *Addison on Contr.* \*207; *Harnett vs. Fielding*, 2 Sch. & Lef. 352, 553; *Buxton vs. Lister*, 3 Atk. 383; *Swift's Dig.* 17; *Cud vs. Rutter*, *supra*; *Willard's Eq.* \*272; *Ross vs. Union Pacific R. R. Co.* *supra*.

*Story* says (*Eq. Jur.* § 717 a); "And the true reason why a contract for stock is not specifically decreed is that it is ordinarily capable of such an exact compensation. But cases of a peculiar stock may easily be supposed where courts of equity might still feel themselves bound to decree a specific performance upon the ground that from its nature it has a peculiar value, and is incapable of compensation by damages."

ered, there can be no substantial reason why the principle should not be held in this country to apply to (and such appears to be the best rule) all securities and shares indiscriminately, whether governmental, public, or private, so long as they are commonly dealt in, and are always easily to be had at the usual public marts—the various Stock Exchanges of the country. In such instances the decisions nearly all agree that a party is fully and amply compensated in damages with which he can purchase other stock or shares of the same description as those contracted for; or he can, immediately upon a failure to deliver shares pursuant to agreement, purchase other shares of the same kind, and charge the seller in an action at law with the difference or damages sustained.

But, as will be seen hereafter, the English courts have established exceptions to this rule in four distinct cases:

1. Where the contract relates to shares in railway companies.

2. Where the question involves a liability for calls and there is no adequate remedy at law.

3. Where there is a trust involved in relation to the shares or stock.

4. Where the bill prays *delivery of certificates* giving the legal title to stock of a foreign government.

(c.) *When Specific Performance refused in England.*

Beginning with the cases in which specific performance has been refused, we find that the remedy was denied upon the general rule above stated in the second reported case that came before an English court.

In *Cud vs. Rutter*, to which we refer,<sup>1</sup> the defendant con-

<sup>1</sup> 1 P. Wms. 570; s. c. *nom.* *Cuddee vs. Rutter*, 5 Vin. Abr. 538, pl. 21, where the case (p. 539) is fully reported, also in 20 Vin. Abr., title "Stocks," pl. 9; cited in *Proc. in Ch.* 534, by *nom.* *Scould vs. Butter*, 2 Eq. Ca. Abr. 18, pl. 8; 1 Madd. Pr. Ch. (3d Am. ed.) 402. See also *White &*

tracted to transfer certain South Sea stock. On a bill to compel performance of the contract, it was objected that there was no instance or precedent where execution had been decreed in such a case, and that defendant was willing to pay the difference, and that with the money the plaintiff could obtain the same amount of stock upon the Exchange. Sir J. Jekyll, M. R., held, however, that the execution of such an agreement was beating down and preventing stock-jobbing, and decreed that the stock be transferred. On appeal, Lord Chancellor Parker (the Earl of Macclesfield) reversed the decision, delivering his opinion, it is said, with great clearness that a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may, if he pleases, buy the quantity of stock agreed to be transferred to him, for there can be no difference between one man's stock and another's. "It is true," said the lord chancellor, "one parcel of land may vary from and be more commodious, pleasant, or convenient than another parcel of land; but £1000 South Sea stock, whether it be A, B, C, or D's, is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover damages, with which, when received, he may buy the stock himself."<sup>1</sup> Although it was objected that *Cud vs. Rutter* was without precedent, yet such was not the fact, as appears by the case of *Gardener vs. Pullen*,<sup>2</sup> wherein the court

Tudor's Leading Cases in Eq. 528, where the case is reported with a full note upon the subject; also *Mason vs. Armitage*, 13 Ves. 37.

<sup>1</sup> A note to this case says: "In this case it is to be observed that although specific performance of the agreement was refused, yet the lord chancellor declared that the defendant not having acted fairly, but having given occasion to the plaintiff to

hope that he would transfer the stock, should not only lose his costs, which he otherwise would be entitled to, but that he should pay the plaintiff the difference of the stock, not only as it was on the day when the defendant was to deliver the stock, but as it was on a subsequent day, when the plaintiff purchased his stock."

<sup>2</sup> 2 Vern. 394, decided in 1700.

decreed specific performance of the contract to transfer certain *East India stock*. It is therefore a matter of curiosity that the latter case was not noticed by Lord Parker, for they were only a few years apart.

And the same views have since been repeatedly enforced in England in relation to contracts for the transfer or sale of stock; though, as will be seen, there have been peculiar cases where courts of equity have decreed performance of even those contracts.<sup>1</sup> In *Buxton vs. Lister*,<sup>2</sup> Lord Hardwicke said: "In general, this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, etc.; for, as those are contracts which relate to merchandise, that vary according to the different times and circumstances, if a court of equity should admit such bills it might drive on parties to the execution of a contract to the ruin of one side, when, upon an action, that party might not have paid perhaps above a shilling damage."<sup>3</sup> So in *Adderly vs. Dixon*<sup>4</sup> the rule was correctly stated to be that a court of equity will not generally decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages the party may purchase the same quantity of the like stock or goods.

<sup>1</sup> See *Harnett vs. Fielding*, per Lord Redesdale, 2 Sch. & Lef. 552, 553; *Capper vs. Harris* (1723), Bunb. 135, where Baron Gilbert, in relation to South Sea stock, laid down these rules: 1st. If a contract be executed, a court of equity will not unravel or break into it. 2d. If executory, the plaintiff must seek his remedy at law. *Adderly vs. Dixon*, 1 Sim. & St. 610.

<sup>2</sup> 3 Atk. 384.

<sup>3</sup> *Shaw vs. Fisher*, 5 De G. M. & G.

596; *Nutbrown vs. Thornton*, 10 Ves. 161, where Lord Eldon said: "It is now perfectly settled, that this court will not enforce the specific performance of an agreement for a transfer of stock; but in a book I have of Mr. Brown's I see Lord Hardwicke did that." See comments upon above in note to *Gardener vs. Pullen*, 2 Vern. 394; *Newb. Cont.* 90, 91; *Thompson vs. Harcourt*, 2 Bro. P. C. 415; 193 Toml. ed.

<sup>4</sup> 1 Sim. & St. 610.



Upon the same theory was based the decision of Lord Maclesfield with reference to certain York Building stock;<sup>1</sup> though the decision in that case would seem to be decidedly in conflict with an earlier case,<sup>2</sup> decided in 1725, where Lord Chancellor King decreed specific performance of a contract involving exactly the same kind of stock, in opposition to *Cud vs. Rutter*, which was cited on the argument.

*(d.) Cases Involving "Calls" when Relief Refused.*

But it is apparent that the great majority of the English cases in which specific performance has been decreed have grown out of contests respecting liability for "calls," and which have been fully alluded to in the fifth chapter of this work.<sup>3</sup> In some of that class of cases,<sup>4</sup> however, this relief has been refused. Thus in one of them it appeared that the defendant was, on the 5th of March, 1859, the allottee of 150 shares of the stock of plaintiff's company, and his name was duly entered upon the latter's books. He agreed to pay all calls when due, and to sign the articles of association when required. Subsequently calls were made upon the stock, but he paid none of them, and refused to sign the articles of association and any form of acceptance of his shares. The bill prayed that he might be decreed to sign the articles in respect of the shares, and to sign such other written acceptance as the court should think necessary, and to pay the calls with interest—to which the defendant demurred. In sustaining the demurrer, Vice-chancellor Wood said: "Cases may well arise in which specific performance of a contract to take shares may be properly decreed, though, with the exception of *Shaw vs. Fisher*, there is no example of a decree to this effect. The rule is clear

<sup>1</sup> *Dorison vs. Westbrook*, 5 Vin.

<sup>3</sup> P. 295 et seq.

Abr. 540, pl. 22.

<sup>4</sup> *Oriental Co. vs. Briggs*, 2 John &

<sup>2</sup> *Colt vs. Nettervill*, 2 P. Wms. 304. H. 623.

and simple that where the court perceives that justice cannot be done at law, it will interfere by decreeing specific performance, or otherwise giving complete relief; or, under other circumstances, will supply the defects of the legal remedy, and enable the plaintiff to proceed effectually at law. The present case is put upon that ground, and it is easy to suggest possible cases where no adequate relief could be obtained at law, and where specific performance would be the proper course." After considering another aspect of the case, the vice-chancellor continued: "Independently of these observations, I should hesitate much, in the absence of authority, before decreeing specific performance of a contract to take shares, without some special grounds (which, no doubt, may easily exist in particular cases) to show the inadequacy of the remedy at law." The defendants relied, among other cases, upon *The Sheffield Gas Co. vs. Harrison*<sup>1</sup> and *The New Brunswick Co. vs. Muggeridge*,<sup>2</sup> but the plaintiff claimed that those cases were overruled by *Shaw vs. Fisher*.<sup>3</sup> The vice-chancellor held, however, after a thorough review of the cases, that there was no variance between the two former decisions, and the demurrer was allowed.<sup>4</sup> In the case of *Shaw vs. Fisher*<sup>5</sup> the relief sought was in the first instance refused, because it appeared that the plaintiff could not make title to the shares. There a vendor by public auction of shares in a railway company incorporated by act of Parliament, at the request of the purchaser (who had paid his purchase-money), executed a transfer to a third party, who did not accept the transfer or register himself as shareholder. On a bill filed by the vendor against the purchaser for specific performance, it appearing that the title to the shares had not been accepted, the usual

<sup>1</sup> 17 Beav. 294.<sup>2</sup> 4 Drew. 686.<sup>3</sup> 2 De G. & S. 11.<sup>4</sup> Compare this case with *Odessa Ch.* 152.*Tramway Co. vs. Mendel*, 37 L. T. (n. s.) 275.<sup>5</sup> 2 De G. & S. 11; s. c. 12 Jur.

reference was ordered to a master, with directions to inquire as to what calls had been made; but the plaintiff subsequently<sup>1</sup> failed to obtain a decree for the reason that he had already conveyed the stock to the defendant's vendor, in ignorance that the defendant was purchaser; and the matter having lain by for a whole year, it now seemed impossible to say that the plaintiff had made, or could make, good title to the stock, which is always an insuperable barrier to a decree for specific performance. The bill was accordingly dismissed, the privity of contract, by reason of the transfer to the third party, no longer existing between plaintiff and defendant.

In still another important case<sup>2</sup> the plaintiff likewise failed to obtain a decree. The facts of this case are reported in the fifth chapter,<sup>3</sup> and most of the important cases involving these questions will be found in the same connection.<sup>4</sup>

(e.) *Cases of a Miscellaneous Character.*

Relief has also been refused in cases of a miscellaneous character. Thus a decree for specific performance was denied where a defendant agreed in writing to take shares in a joint-stock company, which were transferable, "and to execute the deed of settlement when required," when the decree would in effect enforce an agreement to enter into a copartnership.<sup>5</sup>

So where a defendant agreed to purchase from the plaintiff

<sup>1</sup> S. c. 5 De G. M. & G. 596.

<sup>2</sup> *Hawkins vs. Maltby*, L. R. 3 Ch. App. 188, rev'g s. c. L. R. 4 Eq. 572; 37 L. J. Ch. 58, 2d action, L. R. 6 Eq. 505, where plaintiff obtained a decree.

<sup>3</sup> P. 295 et seq.

<sup>4</sup> See *Jackson vs. Cocker*, 4 Beav. 59, where it was held that a holder of "scrip certificates" in a proposed railway was not bound to take corresponding shares from his vendor or to indemnify for calls. See also *Columbine vs. Chichester*, 2 Phillips Ch. 27; but see *Becket vs. Bilbrough*, 8 Hare, 188, where

specific performance was granted of a contract entered into for the sale of scrip certificates in a proposed railway company before its incorporation by act of Parliament; *Harris vs. N. D. Railway Co.* 20 Beav. 384, where the court refused to compel directors to perform contract to relieve plaintiff from payment of calls. For a case where specific performance was under peculiar circumstances refused, see *Ex parte London Bank of Scotland*, L. R. 12 Eq. 268.

<sup>5</sup> *Sheffield Gas Co. vs. Harrison*, 17 Beav. 294; but see this case criticised in 4 Drew. 701.

some shares in a company, and he paid the price, but the directors (having the power) refused to assent, so that the purchaser's name could not be placed on the register, the court refused to compel the assent, and refused to decree the specific performance of the contract.<sup>1</sup>

And it has been held that directors cannot be compelled to assent where they have the option to refuse.<sup>2</sup> Such power of the directors must, however, be exercised reasonably, and would be controlled by a court of equity.<sup>3</sup> And a refusal to make any transfer at all to anybody would not be a reasonable answer.<sup>4</sup>

The court will not enforce an agreement to purchase shares made after the presentation of a petition to wind up the company, but before advertisement, by making the purchaser a contributory when both parties were ignorant of the pending petition at the time of the agreement.<sup>5</sup> A person who has, subsequently to an order for winding up a company, agreed to transfer shares in it, has been, however, held liable in damages for refusing to execute a transfer of the shares.<sup>6</sup>

A company having power to purchase its own shares cannot, after it has become insolvent, be compelled to register a transfer of shares which it has contracted to purchase.<sup>7</sup> So where directors, who have agreed to allot shares to the plaintiff, allot all the shares to other persons, the plaintiff's proper

<sup>1</sup> *Birmingham vs. Sheridan*, 33 Beav. 660; 33 L. J. Ch. 571. But it seems this decision is not to be relied on; see remarks of judge who decided the case, *Lind. on Part.* 714, note (u), and L. R. 3 Ch. 393. Also *Poole vs. Middleton*, 9 W. R. 758, where specific performance was decreed of a contract by a shareholder to sell shares in a joint-stock company, although the directors of the company objected to the transfer of the shares being made to the person with whom the contract was entered

into; see *Pinkett vs. Wright*, 2 Hare, 120.

<sup>2</sup> *Hunt vs. Gunn*, 13 C. B. (n. s.) 226.

<sup>3</sup> *Robinson vs. Chartered Bank*, L. R. 1 Eq. 32.

<sup>4</sup> *Evans vs. Wood*, L. R. 5 Eq. 9.

<sup>5</sup> *Ex parte Emmerson*, L. R. 1 Ch. 433; 36 L. J. Ch. 177; 36 L. J. (n. s.) Ch. 652.

<sup>6</sup> *Biederman vs. Stone*, 15 W. R. 811.

<sup>7</sup> *N. Mitchell vs. City of Glasgow Bank*, L. R. 4 App. Cas. 244.

remedy is an action for damages, and not for specific performance or indemnity.<sup>1</sup> And there appears to be no equity to prevent the transfer of shares to a nominee to increase voting power.<sup>2</sup>

*(f.) When Specific Performance Decreed in England.*

We now proceed to consider those cases, involving both stock and shares, in which the relief has been granted; keeping in mind meanwhile the important distinction heretofore stated between these different classes of securities.

One of the earliest cases in which a transfer of shares was decreed is a case that has been already noticed;<sup>3</sup> but, as has been observed, that case would seem to be in decided antagonism with a decision of Lord Macclesfield, where precisely the same kind of stock was in controversy,<sup>4</sup> and certainly conflicts with the earlier case of *Cud vs. Rutter*,<sup>5</sup> though it must be admitted it finds a precedent in a case of still earlier date than the latter adjudication.<sup>6</sup> These conflicting decisions seem to show, if anything, the wide discretion which courts of equity sometimes exercise; granting relief in one case and refusing it in another, and where there would seem to be but a shadow of difference between the facts.<sup>7</sup>

In the case in question,<sup>8</sup> the defendant contracted with the plaintiff to deliver a certain quantity of York Building stock or the difference, and, on demurrer, Lord Chancellor King decreed specific performance, or at least retained the bill, upon

<sup>1</sup> *Ferguson vs. Wilson*, L. R. 2 Ch. 77.

<sup>2</sup> *Pender vs. Lushington*, L. R. 6 Ch. D. 70; *Moffat vs. Farquhar*, L. R. 7 Ch. D. 591.

<sup>3</sup> *Colt vs. Nettervill*, 2 P. Wms. 304.

<sup>4</sup> *Dorison vs. Westbrook*, 5 Vin. Abr. 540, pl. 22.

<sup>5</sup> *Colt vs. Nettervill*, 2 P. Wms. 570.

<sup>6</sup> *Gardener vs. Pullen* (1700), 2 Vern. 374.

<sup>7</sup> Mr. Cox, in his note to *Cud vs. Rutter*, supra, says: "But cases of this kind depend so much on their peculiar circumstances that it seems no general rule can be laid down." See also *Mitf. Eq. Pl. by Jeremy*, 119, note (q); *Story's Eq. Jur.* § 724, note (2).

<sup>8</sup> *Colt vs. Nettervill*, supra.

the ground that at the hearing the case might appear to be attended with such circumstances as may make it just to decree the defendant either to transfer the stock according to his agreement, or at least to pay the difference, as the bill was in this alternative form.

So in *Gardener vs. Pullen*,<sup>1</sup> which would seem to be the earliest case upon the subject, where the contract was in the nature of a bond to transfer certain East India stock before a future day, the court granted the decree, though the stock had greatly risen, and compelled the plaintiff, who brought the bill to determine upon what terms he should be relieved from the penalty of the bond, to transfer the stock in specie and to account for dividends.<sup>2</sup>

Although the courts will not generally decree specific performance of government stock, yet the specific delivery of certificates of stock of a foreign government has been decreed, which gave the plaintiff the legal title thereto.<sup>3</sup> In this case the bill was for the enforcement of a contract for the sale of certain Neapolitan stock. The bill prayed for the specific delivery of certificates relating to such stocks, giving the legal title thereto; and the vice-chancellor (Leach) was of opinion that, inasmuch as the bill prayed *a delivery of the certificates* which would constitute plaintiff the proprietor of a certain quantity of stock, the bill in equity would hold, because a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which would depend upon the personal responsibility of the party; and the vice-chancellor declared that he also considered that the plaintiff, not being the original holder of the scrip, but

<sup>1</sup> 2 Vern. 374.

<sup>2</sup> For when a court of equity decrees specific performance, it does so quite irrespective of any alteration which may have taken place in the

price of the stock (*Lightfoot vs. Creed*, 2 Moo. 255).

<sup>3</sup> *Doloret vs. Rothschild*, 1 Sim. & St. 598; see also *Chaler vs. San Francisco S. R. Co.* 19 Cal. 219.

merely the bearer, might not be able to maintain any action at law upon the contract, and that if he had any title it must be in equity.

So where trusts are involved, specific performance is sometimes decreed of stock. As, for instance, if a trustee of stock sell it, a *cestui que* trust has an option to have it replaced either in stock or the money produced by it with interest.<sup>1</sup>

Specific performance has likewise been decreed of a contract for the sale of an annuity payable out of dividends of stock. It was contended that, as the contract related to the sale of dividends of stock, the same principle applied which guides the court in refusing specific performance of an agreement for the sale of the stock, but the court declined to take this view. The court, per Sir John Leach, said: "There can be no doubt that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him, because a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor."<sup>2</sup>

In another very important case,<sup>3</sup> where the court made, for the first time, a plain distinction between stocks and shares, a defendant was decreed to transfer certain railway shares which he had contracted to deliver to plaintiff. It was urged that specific performance of such a contract would not be decreed, and the case of *Nutbrown vs. Thornton*<sup>\*</sup> was cited to

<sup>1</sup> *Forrest vs. Elwes*, 4 Ves. 497; see also *Jackson vs. Cocker*, 4 Beav. 50; *Duncuft vs. Albrecht*, 12 Sim. 189; *Fyfe vs. Swaby*, 8 Eng. L. & Eq. 184, where a company held to be a trustee of certain shares was compelled to transfer sealed certificates thereof to an equitable owner of the same; see also *Stanton vs. Percival*, 5 H. L. Cas. 257, where the apparent owner of government stock declared himself to be a trustee merely of cer-

tain stock, the court ordered him to transfer that stock to the person beneficially entitled. This is likewise the American rule; see cases cited *infra*.

<sup>2</sup> *Withy vs. Cottle*, 1 Sim. & St. 174; 1 Turn. & R. 78; *Adams vs. Blackwall R. Co.* 13 Jur. 620; s. c. 2 Macn. & G. 118; *Clifford vs. Turrill*, 1 You. & Coll. (C. C.) 138.

<sup>3</sup> *Duncuft vs. Albrecht*, 12 Sim. 198, *aff'd* 199. <sup>\*</sup> 10 Ves. 161.

sustain that argument, and *Doloret vs. Rothschild*<sup>1</sup> was sought to be distinguished. In deciding the case, the vice-chancellor (Sir Launcelot Shadwell) said: "Then the only question is whether there has been any decision from whence you can extract a conclusion that the court will not decree a specific performance of an agreement for the sale of such shares? Now, I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of three-per-cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had on the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce."<sup>2</sup>

Lord Chelmsford, in one of the latest decisions upon this subject,<sup>3</sup> holds that an agreement to accept a transfer of railway shares on which nothing had been paid is not *nudum pactum*, but a contract which may be specifically enforced in equity. In quoting from *Duncuft vs. Albrecht*,<sup>4</sup> the lord chancellor said: "Now, there is no doubt that a bill will lie for specific performance of an agreement to transfer railway shares. This was set at rest by that case."

The majority of stock cases in England in which equity has

<sup>1</sup> 1 Sim. & St. 598.

<sup>2</sup> And this view was subsequently affirmed by the lord chancellor. See *Shaw vs. Fisher*, 5 De G. M. & G. 596; *Wynne vs. Price*, 3 De G. & Sm. 310; *Wilson vs. Keating*, 7 W. R. 484; *Cheale vs. Kenward*, 3 De G. & Sm.

27; *Oriental Co. vs. Briggs*, 2 J. & H. 625; *Paine vs. Hutchinson*, L. R. 3 Eq. 257; *Shepherd vs. Gillespie*, L. R. 5 id. 293.

<sup>3</sup> *Cheale vs. Kenward*, 3 De G. & J. 27.

<sup>4</sup> 12 Sim. 189, 199.



interfered, as heretofore observed, have been those involving principally the question as to the liability between transferrer and transferee or intermediaries for "calls," or assessments imposed upon the shares of certain companies organized under the peculiar system of English laws pertaining to such bodies. It may not be amiss in this connection to briefly refer to some important features as regards the liability in equity of different persons to pay these assessments.

At law the payment of "calls," when made, would seem primarily to fall upon the registered owner of the shares, for it is to him that the company look, and to no one else; but the English courts of equity, in relieving at times the harsh rule of law, hold that when the registered owner sells his shares, or makes a contract for that purpose, the title to the shares thereupon vests in the purchaser or transferee before the deed of transfer is registered upon the books of the company; and as to the payment of "calls" thereafter imposed, the vendor becomes his trustee merely for the number of shares so sold, and there his liability ceases—at least as between the immediate parties.

It often happens, however, that for some reason the final purchaser or transferee fails or refuses to procure the transfer of the shares into his name, or to pay the calls thereon; and if these are made after the sale the registered owner at once becomes liable to the company for them, as his name still appears upon the books as a shareholder—and this liability continues until the purchaser sees fit to register himself, or is compelled so to do by decree of court.

At law, therefore, the vendor becomes almost remediless; for, in an action against him for the "calls," it is no answer that he has parted with the shares,<sup>1</sup> inasmuch as the company

<sup>1</sup> If the vendor pays the intervening call himself, he has, it seems, no remedy at common-law for the recovery of the money from the pur-

are not bound to look beyond the record of shareholders to fix the responsibility for "calls." Again, a court of law could not compel the purchaser to register; and even if the remedy at law be clear, it would be most intolerably unjust to compel the owner of record to sue the vendee upon each successive "call" that is made. Hence the vendor is compelled to resort to equity to compel the final purchaser or transferee to register, to pay the calls imposed, and to indemnify him for all expenditures that he may have made.<sup>1</sup> And where there are several purchasers, each will be bound to indemnify the vendor to the extent of his interest. They will not be jointly and severally liable for the whole number of shares.<sup>2</sup> Doubts have been raised whether the original vendor is entitled to specific performance against the ultimate purchaser where, in accordance with the practice of the Stock Exchange, there have been intermediate sales without the execution of any transfer, and the name of the ultimate purchaser has been supplied to the Broker of the original vendor for the purpose of being inserted in the transfer deed to be executed by the latter.<sup>3</sup> But it would seem that specific performance will be decreed in such a case.<sup>4</sup> Finally, it is held that the decree may provide for both past and future "calls."<sup>5</sup>

chaser (*Humble vs. Langston*, 7 Mee. & W. 517; *Sayles vs. Blane*, 19 L. J. Q. B. 19). But *Humble vs. Langston* is considered overruled. See *Walker vs. Bartlett*, 18 C. B. 845, 862; s. c. 36 Eng. L. & Eq. 368; *Brown & Theobald's Law of Railways*, 69, note.

<sup>1</sup> See, on this point, *Ex parte Straffon*, 22 L. J. Ch. 206; *Wynne vs. Price*, 3 De G. & Sm. 310; *Shaw vs. Rowley*, 16 Mee. & W. 815; *Shaw vs. Fisher*, 2 De G. & Sm. 11; *Paine vs. Hutchinson*, L. R. 3 Ch. 388; *Hawkins vs. Maltby*, L. R. 4 Ch. 200.

<sup>2</sup> *Brown vs. Black*, L. R. 8 Ch. 939.

<sup>3</sup> *Hawkins vs. Maltby*, L. R. 3 Ch. App. 188, rev'g L. R. 4 Eq. 572.

<sup>4</sup> *In re Overend, Gurney, & Co.*, *Musgrave and Hart's Case*, L. R. 5 Eq. 193; 37 L. J. Ch. 161. See *Evans vs. Wood*, 5 Eq. 9; *Hodgkinson vs. Kelley*, 6 Eq. 496. *Contra*, *Shepherd vs. Murphy*, Ir. Rep. 1 Eq. 490; *Davis vs. Haycock*, L. R. 3 Ex. 373.

<sup>5</sup> *Coles vs. Bristowe*, L. R. 6 Eq. 149, and cases cited on p. 153 of that case; *Wynne vs. Price*, *supra*; *Shepherd vs. Gillespie*, L. R. 3 Ch. App. 764; s. c. L. R. 5 Eq. 293. The following are additional cases in which the courts have decreed specific performance: *Poole vs. Middleton*, 9 W.

### *III. Specific Performance in the United States.*

#### *(a.) Preliminary Observations.*

In the United States the subject of specific performance of contracts for the sale of securities has been frequently before the courts, and they seem inclined not to decree performance of contracts concerning either stocks or shares unless damages at law are utterly inadequate, or the remedy there is doubtful. This results from the fact that nearly all kinds of stocks and shares are in this country easily to be procured at the Stock Exchange, and the difference, if any, recovered by an aggrieved party in damages at law; there being no difference generally between one share and another where the stock is numerous and has a market price. And a party is generally fully compensated by the latter remedy.<sup>1</sup> The rule, it has been declared by an able federal judge (Miller), should be applied indifferently to government stocks and to shares or stocks and bonds of railway companies.<sup>2</sup> It is to be observed, however, that where a trust has been created in relation to stocks, shares, or any other chattel, there is no doubt but that a bill

R.758. Purchaser of shares in a company compelled to take same and to pay calls, *Odessa Tramway Co. vs. Mendel*, 37 L. T. (n. s.) 275; indemnity against future calls decreed, *Wynne vs. Price*, 3 De G. & Sm. 310; *New Brunswick Co. vs. Muggeridge*, 4 Drew. 687.

<sup>1</sup> *Ross vs. Union Pacific R. R. Co.* 1 Woolw. (U. S. C. Ct.) 26, 32. See the general rule ably stated per Welles, J., *Jones vs. Newhall*, 115 Mass. 248; also *Adams on Eq.* 83; *Fry on Spec. Perf.* § 10, 11, 12, 23, 30, 37; *Seymour vs. Delancey*, 3 Cow. 446, 505. As to when a contract for the sale of stock will be decreed, where real estate is

concerned, see *Burton vs. Shotwell*, 13 Bush (Ky.), 271.

<sup>2</sup> *Ross vs. Union Pacific R. R. Co.* supra; see also *Fallon vs. R. R. Co.* 1 Dillon, 121. But see 3 Pars. on Cont. (6th ed.) 369, where it is said: "The question has not arisen in this country so frequently or so directly as to enable us to lay down what may be called an American rule of law in relation to it. Perhaps, however, from the wider meaning of the word 'stock' among us, and the greater complexity of the questions which occur in relation to the sale of it, we might expect a wider relaxation of the rule than in England, even if the rule itself be adopted."

in equity will lie to enforce the trust and to have a transfer of the property. Upon this point the authorities are agreed and the law seems to be settled.<sup>1</sup> And the English rule is the same in relation to such property where any trust is involved.<sup>2</sup> In a recent case in New York, specific performance was decreed of a contract to pay a shareholder dividends upon preferred stock which he held.<sup>3</sup>

*(b.) When Relief Refused.*

We begin, then, with a consideration of those cases in the United States which have refused to decree these contracts.

In so far as the decisions in this country have refused to decree performance of contracts involving public stocks—*i. e.*, government bonds—they may be said to agree with the English rule upon the subject. However, so few cases have come before the courts upon this question that it cannot well be said that the law in respect thereto has as yet been definitely settled.

Only one case involving public securities or government bonds has thus far been dealt with by the courts, and it does not appear that this decision has ever seen the light of the highest appellate tribunal.

In *Ross vs. Union Pacific Railroad Co.*,<sup>4</sup> which is perhaps the only authority upon the subject, the plaintiff contracted with defendant to build for it a railroad, for which it agreed to pay in government bonds of the United States and in the bonds and stocks of the company. On a bill for a specific

<sup>1</sup> *Ferguson vs. Paschall*, 11 Mo. 267; 495; *Draper vs. Stone*, 71 Me. (1 Cowles vs. Whitman, 10 Conn. 121; Spauld.) 175; *Johnson vs. Brooks*, Clark vs. Flint, 39 Mass. 231; *Mechanics' Bank vs. Seton*, 1 Pet. 299, 14 J. & S. 13; *Anderson vs. Biddle*, 10 Mo. 23.

where the subject is fully considered in a lengthy opinion in which the court decreed transfer of bank shares; *Gram vs. Stebbins*, 6 Paige, 124; *Bis-sell vs. Farmers' Bank*, 5 McLean,

<sup>2</sup> See cases cited *supra*.

<sup>3</sup> *Boardman vs. Lake Shore and M. S. R. R. Co.* 84 N. Y. 158.

<sup>4</sup> 1 Woolw. (U. S. C. Ct.) 26, 34.

performance of the contract, it was held by Mr. Justice Miller, of the Supreme Court of the United States,<sup>1</sup> in the course of an elaborate opinion, that the bonds of the United States were stocks within any definition which could be given of that term, and that they were public stocks—government stocks. The court said, in referring to the English cases upon the subject of public stocks, that the decisions were clear and uniform that a covenant for their delivery will not be specifically enforced in equity, and no case could be found to the contrary. As to the shares of the railroad company, the court applied the same rule, and could perceive no sound distinction between them and government stocks. “They belong to a class of securities which are generally called stocks; they are the subject of every-day sale in the market, and the rates at which they are selling are quoted in the public commercial reports, so that their value is as readily and certainly ascertained as that of government stocks. No especial value attaches to one share over another, and the money which will pay for one will as readily purchase another. The damages, then, for failure to deliver any such shares may be awarded at law, and be an adequate compensation for the injury sustained.”<sup>2</sup> On this point the court cited, among others, the well-known case of *Cud vs. Rutter*, and quoted extensively from the opinion of Lord Chancellor Parker in that case. “In England, by recent decisions, the jurisdiction seems to have been extended beyond the early cases. In them it has been said that there is no analogy between government stocks and railroad shares, because the latter are limited in amount, and are not always to be had in the market.” Whether the distinction taken in these cases shall be held finally to prevail in this country, and, if it be established, whether it shall be

<sup>1</sup> Sitting in the 8th Cir. Ct.

357; *Woodward vs. Harris*, 2 Barb.

<sup>2</sup> See *Sears vs. Boston*, 33 Mass. 943.

held applicable in principle to cases like this, the court did not determine.

It will be noticed, however, that while, as to the government bonds, the court adopted the English rule, and classed them as public stocks, as to the railroad shares, contracts for which have frequently been decreed in England, the court did not follow the well-known English rule, but appears to have taken the ground that they should be classed in the same category with stocks, and that there was no substantial difference between them.<sup>1</sup> So, in another case in the United States Circuit Court,<sup>2</sup> the court refused to decree specific execution of a contract for the construction of a railroad, where payment was to be made in bonds and stocks of the company.<sup>3</sup>

And in a recent case in New Jersey, specific performance was refused of a contract to build and equip a railroad, although the price was to be paid in the stocks and bonds of the company. The bill was dismissed, however, owing to the inability of the defendant to fulfil its contract, by reason of its failure to comply with the requirements of a general law under which it was incorporated, by which its charter was forfeited. In the course of his opinion the chancellor made the following remarks: "There are several considerations which forbid the granting of the relief prayed for in this suit. If this court could undertake the performance of such a contract as that stated in the bill . . . (and the current and great weight of authority is decidedly against it . . .) the disability of the defendants would be a sufficient reason for refusing."<sup>4</sup>

<sup>1</sup> See *Duncuft vs. Albrecht*, 12 Sim. 189; *Shaw vs. Fisher*, 5 Railw. Cas. 159.      <sup>4</sup> Citing *Story's Eq. Jur.* § 726; *Ross vs. Union Pacific R. R. Co.* 1 Woolw. 20; *Fallon vs. Railroad Co.*

<sup>2</sup> *Fallon vs. Railroad Co.* 1 Dillon (U. S. C. Ct.), 125.      <sup>5</sup> *Danforth vs. Philadelphia etc.*

<sup>3</sup> See also *Mississippi etc. R. R. Co. vs. Cromwell*, 91 U. S. 643.      *R. R. Co.* 30 N. J. Eq. 15.

Perhaps one of the most interesting cases upon the subject of specific performance of contracts for sale of shares that has yet been before the courts of this country is that of Foll's Appeal,<sup>1</sup> recently decided by the Supreme Court of the State of Pennsylvania. The court appear to have given the case most attentive consideration in all of its aspects. The bill was filed to compel the specific performance of an agreement to sell certain stock in a national bank. It appeared in the case that the purchase had been made to enable complainant, with what stock he already had, to get control of the bank, and that such was the understanding between the two, and that defendant's shares would give him such control; that that was his object in making the purchase of the same, without which, as he alleged, his own stock would be of little value; that if Foll's stock were transferred to one W., complainant would lose control of the bank, and an injunction was asked to restrain such transfer. By a supplemental bill, it was alleged that there was no stock in the market; that none could be purchased; and that damages would not compensate. On appeal from a decree in complainant's favor, Paxson, J., in reciting the facts, stated that the case presented some extraordinary features, and that there had been nothing like it in the State since equity powers were conferred upon the courts. But the bill was dismissed upon the ground that it was against public policy. Upon this branch of the case the court said: "A person who is attempting to make a 'corner' in stock, or in any article of merchandise, who had made his contracts with that end in view, might with equal propriety call upon us to decree specific performance. But the decree of a chancellor is the exercise of a sound discretion. It is of grace, not

<sup>1</sup> 91 Pa. St. 434; s. c. 36 Leg. Int. case, 3 Parsons on Cont. (6th ed.) (Pa.) 495; see form of bill in this action, and see, in connection with this \*371.

of right, and will never be made where the equity and justice of a case are not clear."

Whether the court would have decreed performance of the contract had it been fair and honest was not decided, and hence the question may be considered to be as yet undetermined in that State.

Upon the same ground the Supreme Court of Massachusetts, in a recent case,<sup>1</sup> was inclined to refuse to decree specific performance of a contract to buy shares in a corporation.<sup>2</sup>

Specific performance of a contract to transfer stock in an insurance company has been refused in Missouri upon the ground that the remedy at law was adequate.<sup>3</sup> "It seems to be now settled," said the court in this case, "though it was once held otherwise, that, in general, a specific performance of a contract for the transfer of a stock will not be decreed. In this case the contract has already been executed."<sup>4</sup>

(c.) *When Decreed as to Railway Shares.*

In the following cases concerning railroad shares specific performance was decreed.

In *Austin vs. Gillespie*,<sup>5</sup> A had agreed conditionally with others to subscribe a certain amount to the stock of an unincorporated railway company; and B and C agreed with him in writing that if he would do so unconditionally they would each take one fourth of such stock off his hands by subscribing for it in their own names; and A afterwards made such subscription absolutely: it was held that equity would de-

<sup>1</sup> *Noyes vs. Marsh*, 123 Mass. 287.

<sup>2</sup> See also *Railroad Co. vs. Echter-nacht*, 21 Pa. St. 220.

<sup>3</sup> *Ferguson vs. Paschall*, 11 Mo. 267.

<sup>4</sup> The general rule is likewise recognized in the following American cases: *Carpenter vs. Ins. Co.* 4 Sandf. Ch. 408; *Brown vs. Galliland*, 3 De-

sau, 539; *Phillips vs. Berger*, 2 Barb. 608; 8 id. 527; *Sullivan vs. Tuck*, 1 Md. Ch. 59; *Walters vs. Howard*, id. 112. See also *Clark vs. Flint*, 39 Mass. 231; *Lowry vs. Muldron*, 8 Rich. (S. C.) Eq. 241; *McGowan vs. Remington*, 12 Pa. St. 56.

<sup>5</sup> 1 Jones (N. C.) Eq. 261.



creed the performance of such agreement. The defendant objected that there was a complete remedy at law in damages. "This objection," said the court, "might avail when applied to a contract for the sale and transfer of stock in a company already in existence and whose stock had in market a certain, or nearly certain, value. But the slightest reflection will convince any one who turns his attention to the subject that this is a very different case. Here the company was just struggling into life, and the subscribers for its stock were taking upon themselves very heavy burdens with a dim prospect of future advantage. It would therefore be manifestly impossible to give to the plaintiff in a suit at law damages at all commensurate with the injury which he might sustain by the failure of the defendants to fulfil their engagement with him." But the decision in that case does not seem to be reconcilable with one cited,<sup>1</sup> where the court refused to decree performance of an agreement or subscription to take stock in an unchartered railway company.

Again, in the same State,<sup>2</sup> to the objection that the remedy was complete at law, the court said that might be so in England in reference to government stock, which, like corn or flour, may be bought for the money in market at any time. But the doctrine had no application to railroad stock.

So, in a recent case in Massachusetts,<sup>3</sup> plaintiff bought of a member of a firm shares of stock in a railway company, and took from the firm a power of attorney authorizing him to procure a transfer of the shares on the books of the corporation. The firm had at the time a large number of shares standing to its credit on the books of the corporation. The plaintiff delayed for some months to present his power of attorney to the latter

<sup>1</sup> *Railroad Co. vs. Echternacht*, 21 Pa. St. 220.

<sup>2</sup> *Ashe vs. Johnson*, 2 Jones Eq. (N. C.) 155.

<sup>3</sup> *Wouson vs. Fenno*, 129 Mass. 407.

body, and in the meantime the firm sold all of its shares to other persons, who obtained certificates from the corporation. The bill was dismissed as against the railroad company; and it was held that the plaintiff was not entitled in equity as against a partner who had no knowledge of the transactions to a decree for the delivery to him of a certificate of the shares of the stock, which had risen in value, but was entitled to a decree for the money which he had paid, with interest. The court said: "The bill should not be dismissed, because the plaintiff might recover this sum in an action at law; for a court of equity, while denying the specific relief prayed, may give to a plaintiff the compensation to which he appears to be entitled."

In *Leach vs. Forbes*<sup>1</sup> the parties compromised, by agreement in writing, a controversy over a will involving real estate and stocks. It was objected, on a bill to enforce the agreement, that the case presented no equity; but the court enforced the bill upon the ground that the agreement was not only for the transfer of shares, but also for the conveyance of real estate; and as the court considered it proper to give relief for this part of the agreement, it also entertained jurisdiction of the whole; and accordingly, without deciding whether a suit in equity could be supported for the sole purpose of enforcing a contract for the sale of the shares, the court enforced that part relating to them. In the course of his opinion Bigelow, J., said: "The more recent authorities are quite decisive as to the authority of a Court of Chancery to decree the specific performance of a contract for the transfer of shares in joint-stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount and the number of shares is limited."<sup>2</sup> Subsequently, the same court

<sup>1</sup> 77 Mass. 506. See *Treasurer vs. Commercial Co.* 23 Cal. 390.

<sup>2</sup> A case much like this is *Burton vs. Shotwell*, 13 W. Bush (Ky.), 271,

held<sup>1</sup> that a bill would lie to enforce a transfer of shares in a corporation. There the agreement was to transfer the shares upon the payment of a note without grace at maturity given for the price thereof.<sup>2</sup>

The subject has also received some consideration in the State of New York, though no case has apparently yet arisen there involving the transfer of railroad shares.<sup>3</sup> Performance of a contract for the transfer of stock of an association has been there decreed<sup>4</sup> for the following reasons: 1st. Because the parties evidently contemplated and especially contracted for a reconveyance of the stock. 2d. Because, as well on account of the uncertain value of the stock in the market and the infrequent sales of it<sup>5</sup> as the varying character and success of the business which the stock represented, it was difficult, if not impossible, to do justice between the parties in an award of damages. These are controlling reasons in equity for a specific performance.

Upon the same ground was based a recent decision in the Court of Appeals of that State,<sup>6</sup> where the court gave the subject a most thorough examination, and decreed the transfer upon its books by a manufacturing corporation of shares of its capital stock to the owner of the same. The court, while admitting that the transfer of stock will not generally be decreed, held that the rule was limited to cases where a compen-

where the court took the same view and decreed the transfer, etc.

<sup>1</sup> Todd vs. Taft, 89 Mass. 371.

<sup>2</sup> But see Noyes vs. Marsh, 123 Mass. 286, where the court refused to decree performance of a contract involving the sale of shares, upon the ground that the remedy at law was adequate. See Suter vs. Matthews, id. 255; Wonson vs. Fenno, 129 Mass. 407.

<sup>3</sup> Pollock vs. National Bank, 7 N. Y. 274; Purchase vs. Bank, 3 Robt. (N. Y.) 364; see, however, a peculiar

case—Johnson vs. Albany & S. R. R. Co. 54 N. Y. 417—where the court refused to decree a transfer of railway shares, but upon other grounds. And as to what must be alleged in complaint for delivery of railroad stock, see Burrall vs. Bushwick R. R. Co. 75 N. Y. 211.

<sup>4</sup> White vs. Schuyler, 1 Ab. (n. s.) 300; s. c. 31 How. 38.

<sup>5</sup> On this point, see Hardenbergh vs. Bacon, 33 Cal. 356.

<sup>6</sup> Cushman vs. Thayer Mfg. Co. 76 N. Y. (35 Sick.) 365.

sation in damages would furnish a complete and satisfactory remedy. In this case, Judge Miller, in the course of an able opinion, said: "It is easy to see that a party may become the owner or purchaser of stock in a corporation which he desires to hold as a permanent investment which may be at the time of but little value—in fact, without any market value whatever—and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which would work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law."

The same kind of argument seems to have been successfully advanced in a case in California, where the court, in upholding a decree to transfer the stock, said: "In the peculiar condition of business and mining operations within this State, where numerous mining and other corporations are in existence, whose stock is often of fluctuating<sup>1</sup> and uncertain value, and where certain kinds of stock have a peculiar value to those acquainted with their affairs—where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals is so great—courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance."<sup>2</sup>

And where an act of the legislature of a State authorized

<sup>1</sup> Specific performance will not be had on the negotiations of the refused as inequitable because of the parties (*Nims vs. Vaughn*, 40 Mich. fluctuation of values, where the 356).

court has no means of knowing what <sup>2</sup> *Treasurer vs. Commercial Co.* 23 bearing the terms of the contract Cal. 391.

the sale of certain turnpike-road stock held by the State, and a sale of the same was effected, but afterwards the law authorizing the sale was repealed, and the commissioners refused to carry out their contract, it was held that the plaintiff was entitled to the specific transfer of the stock as if the act had not been repealed.<sup>1</sup>

In conclusion, it may be said that the general rule recognized in all the cases, both in this country and England, is that where it appears the aggrieved party can be fully compensated in damages in an action at law, a bill to enforce the specific performance of contracts for the sale of securities will not lie; but that this rule has many exceptions is apparent from the foregoing summary, some of which arise out of the character of the parties to the transaction, and most of them out of the nature of the stock itself.

#### *IV. Mandamus.*

The question whether a party can procure, by means of the prerogative writ of mandamus, a transfer of shares upon the books of a corporation which wrongfully refuses to make the transfer has been settled both in this country and in England, and it is held that the courts will not issue the writ where it appears that the party seeking the same has an adequate, ample, and specific remedy at law in damages; and where the relator merely seeks to be put into possession of corporate shares which have an ascertained market value, and can be bought in the market, there would seem to be no occasion to resort to the remedy.<sup>2</sup>

Courts will not exercise their extraordinary power, by means of this writ, to effect purposes as well effected by the ordinary remedies; and, accordingly, to obtain relief by man-

<sup>1</sup> Baldwin vs. Commonwealth, 11 W. Bush (Ky.), 417.

<sup>2</sup> Murray vs. Stevens, 110 Mass. 95.

damus the applicant must not only show a specific legal right, but there must be no other specific remedy to enforce that right.<sup>1</sup> This rule has been steadily enforced by the English courts since the well-known case of *The King vs. Bank of England*,<sup>2</sup> which has been followed in most instances by the courts of this country.

The decisions upon this subject in relation to contracts for the transfer of stock and shares are not numerous; but the rule seems to be clear that the remedy cannot be procured to compel a transfer or issuance of such securities if it appear that the applicant has any adequate remedy by action at law. It cannot be doubted, however, that mandamus will and ought to issue where the remedy at law is inadequate or doubtful, or where some public trust or interest is connected with the duty to transfer or issue the shares; and there are cases which go this far.<sup>3</sup> Generally, however, a party is deemed to have an adequate remedy against a corporation by an action on the case for damages in wrongfully refusing to transfer the shares, or in assumpsit, which has been held to be the proper remedy where mandamus does not lie.<sup>4</sup> It seems, however, pretty well settled that either remedy may be pursued; and assumpsit lies against such corporations on the ground that all duties imposed upon them by law raise an *implied promise of performance*.<sup>5</sup>

In England the somewhat inflexible rule which has prevailed since the decision of Lord Mansfield has apparently given birth to a statute,<sup>6</sup> by which it seems mandamus will

<sup>1</sup> Ang. & Ames on Corp. (10th ed.) ex rel. Content vs. Metropolitan R. Co. N. Y. *Daily Reg.* Dec. 22, 1881.  
§ 710.

<sup>2</sup> 2 Doug. 523.

<sup>3</sup> See *Townsend vs. McIver*, 2 So. Ca. (n. s.) 25.

<sup>4</sup> *King vs. Bank of England*, 2 Doug. 523; *Kortright vs. Buffalo Bank*, 20 Wend. 91; *State vs. Rom-* ley vs. Mechanics' Bank, 10 Johns. 484; see also *Ellis vs. Essex Bridge* Co. 19 Mass. 253.

*bauer*, 46 Mo. 155. See also *People* 17 and 18 Vict. c. 125.

issue in cases where at common-law it would have been refused; and it has been used to compel the registry of shares.<sup>1</sup>

So in the State of Louisiana, under the Code, *mandamus* will lie to compel the transfer of railway shares, but not, however, where the issuance of the writ would compel a violation of the charter of a corporation.<sup>2</sup>

It seems, however, that where a corporation arbitrarily refuses to register shares without sufficient reasons therefor, there ought to be a speedier and more specific remedy than that by action of *assumpsit*, or upon the case; for very often mere damages do not compensate a party for the loss of his shares, and a suit at law against a corporation is generally a tedious undertaking, involving perhaps many trials and much expense.<sup>3</sup>

In the case of *The King vs. Bank of England*,<sup>4</sup> the application was for a writ of *mandamus* to the defendants, commanding them to permit the prosecutor to transfer certain of the stock of the defendant as having been the property of their testator. The facts showed that one L., being possessed of considerable of the stock of the bank, which stood in his name, by his will gave his executors, as a legacy, £1000 thereof. The executor who proved the will, but never transferred the stock to his own name, by his own will, of which the prosecutors were the executors, bequeathed the £1000 stock to a kinswoman. His will was proved, and application made to the bank for a transfer of the stock, which was refused unless proof was made of the death of the executor's legatee by certificate of the governors of the hospital where she had been placed and was supposed to have died. This they were unable to procure, and the bank refused the transfer. It was

<sup>1</sup> See *Norris vs. Irish Land Co.* 8 El. & Bl. 511; *Ward vs. Southeastern Ry. Co.* 29 L. J. (Q. B.) 177; 2 El. & El. 812.

<sup>2</sup> *State vs. N. O. & C. R. Co.* 30 La. Ann. 308.

<sup>3</sup> See *Townsend vs. McIver*, 2 So. Ca. (n. s.) 25.

<sup>4</sup> 2 Doug. 523.

there held that where there is no specific remedy the court will grant the writ that justice may be done; but where an action will lie for complete satisfaction equivalent to a specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of mandamus. Lord Mansfield said he did not think this to be a clear case, and the writ was refused. Afterwards an action of assumpsit was brought, in which the plaintiffs were successful.<sup>1</sup>

In *State vs. Rombauer*,<sup>2</sup> where a corporation refused to transfer stock upon its books, the court said, in refusing an application for the writ: "It is very clear that the relator has misconceived his remedy, and that he may obtain adequate and ample redress without resorting to a proceeding by mandamus. If he has good title to the stock, he can recover the market value in an ordinary action. There can be no necessity for his possessing the identical shares in question. A controversy might spring up in regard to the ownership, and that would require an adjudication at law. Courts will not venture on determining such matters by proceedings on mandamus."

So in a recent case in Massachusetts, in which the language of the court is much like that just quoted,<sup>3</sup> the court said that, without laying down any invariable rule upon the subject, the remedy was not well adapted for the trial of mere questions of property. "When the relator merely seeks to be put into possession of corporate shares which have an ascer-

<sup>1</sup> To same effect are *Shipley vs. Mass.* 364; *Pinkerton vs. Manchester Bank*, 10 Johns. 484; *Ex parte Firemen's Ins. Co.* 6 Hill, 243; *Bank of Attica vs. Manufacturers' etc. Bank*, 20 N. Y. 501; *Asylum vs. Phenix Bank*, 4 Conn. 172; *People vs. Parker Vein Coal Co.* 10 How. Pr. 543; *id.* 186; *Gray vs. Portland Bank*, 69

*etc. R. Co.* 42 N. H. 424; *Eastern R. Co. vs. Benedict*, 76 Mass. 21; *German Union Bldg. etc. vs. Scudmeyer*, 50 Pa. St. 67.

<sup>2</sup> 46 Mo. 155.

<sup>3</sup> *Murray vs. Stevens*, 110 Mass. 95.



tainable market value, or which can be bought in the market, and where the incidental rights of ownership (such as eligibility to corporate offices, or the right to vote at corporation meetings) do not depend upon the ownership of the specific shares which are the subject of dispute, but could be as well and fully enjoyed by virtue of the ownership of an equal number of other shares, there would seem to be no occasion to resort to the extraordinary remedy of mandamus.”<sup>1</sup>

The remarks of the court in *Wilkinson vs. Providence Bank*,<sup>2</sup> where bank stock was concerned, are interesting in this connection. It was there contended that the remedy by action was not specific, and could not give the petitioner the stock and the corporate rights which he would have as the recognized holder of the stock, and therefore he claimed to be entitled to the specific relief afforded by mandamus. The court said: “But the law regards bank stock as a subject of pecuniary value, only capable of being fully compensated for in damages. The corporate rights are merely incidental to the stock, and of no value except in connection with it. It is not necessary that the remedy should be specific; it is sufficient if it be adequate. This, the court concludes, is the settled law both of the English and American courts.”

The question has been also fully considered in a recent case in Pennsylvania, and the law stated to be as above set forth. In that case<sup>3</sup> it was said that if the courts were inclined to enlarge the remedy by mandamus, it could not be done in a case where the right is disputed, where no public interest is involved, where no specific reason is shown for a transfer of a specific and favored thing, and where the remedy by action is fully complete. It was accordingly held that the purchaser

<sup>1</sup> See also 12 Kan. 147; 44 Cal. 173; 17 Ad. & E. (Q. B.) 645.

<sup>2</sup> *Birmingham Ins. Co. vs. Commonwealth*, 92 Pa. St. 72-77.

<sup>3</sup> 3 E. I. 22, 25.

of stock in a corporation, at a sale under execution against the owner, was not entitled to mandamus against the officers of the corporation who refused to transfer the stock to him on the books of the company.

In a recent case in New York, where the applicant for a peremptory writ of mandamus sought to compel a railway company to issue to him certain certificates of stock—to conform to certificates which he had previously surrendered, containing the statement of a guaranty by another corporation of certain interest—the applicant contending that the shares which the company offered to deliver to him in exchange for those surrendered were illegal, the court refused to grant the writ, upon the ground that the stock had not only been previously declared legal and binding, but upon the further ground that the applicant, if aggrieved, had an adequate remedy for any damages which he may have sustained, and that upon familiar principles the writ should not issue in such a case.<sup>1</sup>

But the writ is sometimes granted, and the two English cases heretofore cited<sup>2</sup> are instances in which the courts have granted the writ to compel corporations to transfer shares. Both these cases, perhaps, go further than the decisions in this country, for in England the inclination of the courts has been to enlarge the remedy by mandamus. In the Norris case stress was laid on the fact that the company were established by royal charter, which made it their duty to keep the register, and insert the names of the proprietors, in which, it was said, the public are largely interested.<sup>3</sup>

And such appears to be the view which was taken of the matter by a recent decision in South Carolina, which seems to

<sup>1</sup> People ex rel. Content vs. Metropolitan R. R. Co. N. Y. *Daily Reg.* Dec. 22, 1881. & Bl. 511; Ward vs. Southeastern Ry. Co. 29 L. J. (Q. B.) 177; 2 El. & El. 812.

<sup>2</sup> Norris vs. Irish Land Co. 8 El. <sup>3</sup> See 7 Alb. L. J. 135 (Feb. 14, 1880).

be opposed to the general authorities.<sup>1</sup> There it was held that while mandamus to compel a transfer of stock will not be granted where there has been no demand and refusal to make the transfer, yet, where the rules of the company required that the certificate of stock should be transferred "in person or by attorney," at the office of the company, and it appeared that a demand had been made by letter, and that the officers of the company had peremptorily refused to permit the transfer to be made, it was not necessary to show that the useless ceremony of appearing at the office and there demanding the transfer had been observed. It was further held that where the stock sought to be transferred is owned by a corporation, whose directors, being vested with the necessary power to that end, authorize its president to sell it, a contract of sale by him shows a sufficient legal and equitable title in the purchaser to entitle him to the writ of mandamus to compel the officers to transfer the stock to him. It is no ground of objection to the issuing of a writ of mandamus to compel the transfer of stock that the purchasers have joined with the sellers in the application for the writ. Though it be true that mandamus will not lie unless the duty to be performed is one in which the public have an interest, and not even then when the party demanding the writ has another plain and adequate remedy, yet the duty of the officers of a railroad corporation to permit the transfer of its stock is one in which the public have a sufficient interest to warrant the court in issuing the writ of mandamus to compel its performance; and the remedy by action against the officers of the corporation to recover damages for their refusal to permit the transfer is too doubtful and uncertain in its character to supersede the specific and speedier remedy by mandamus.

<sup>1</sup> *Townsend vs. McIver*, 2 So. Ca. (n. s.) 25.

### V. *The Effect of Usury upon Stock Transactions.*

In England usury was at a very early period made a penal offence by statute. The earliest of these acts were passed to prevent Brokers loaning money at exorbitant or usurious rates; and, if we may be permitted to judge from the severity of these enactments, it would appear that the offence must have been a very common one. By statute 8 Hen. VII. c. 6, Brokers of such bargains were to be set in the pillory, imprisoned half a year, and fined twenty pounds. This statute likewise disabled offending Brokers from ever acting again. But different views have at length prevailed in England as to the propriety of regulating usury by such severe methods, and, in consequence, all laws relating thereto have been properly repealed and abrogated.<sup>1</sup> But in this country usury is still prohibited by the statutes of the various States, and it becomes an important element to consider in connection with the business of Stock-brokers, because in the transaction of their business enormous sums of money are daily loaned, and perhaps in no other business is the utter futility of usury laws so glaringly demonstrated.

Usury is nothing more than the charging of a rate for the use of money in excess of the sum fixed by the legislature, which latter is called interest; but it is manifest that the rate for the loan of money cannot be successfully fixed by a rule of law, because the charges for money, just as for other commodities, are constantly varying in accordance with the demand and supply.<sup>2</sup> If there is a surplus of capital in the

<sup>1</sup> Statute 17 & 18 Vict. c. 90.

<sup>2</sup> Usury has been aptly defined "to be the taking or contracting for exorbitant interest for the forbearance of the principal. Sometimes the *thing* taken or contracted for is so called,

in which sense *usury* and *interest* are nearly synonymous, and differ only in the *quantity* of the compensation which is to be paid for the use of the principal; the former implying that it is *exorbitant*, the latter that it is

market, the rate for the loan of money will be low ; if, on the other hand, capital is scarce, the rate will naturally rise. Consequently, the usury laws are daily evaded and broken, and will continue to be until the legislatures of the different States abolish them altogether.<sup>1</sup> As the laws against usury still exist in many of the States, it will be our duty briefly to set forth some of the general rules and decisions of the English and American courts upon the subject, so far as they concern transactions in stocks and securities by Brokers.

*lawful*" (Ord on Usury, 1). See Tyler on Usury, 92; also Chitty on Cont. (6th Am. ed.) 701.

A few historical suggestions in reference to this subject, as it bears upon Brokers, may not be uninteresting. Addison says: "The taking of hire or reward for the use of money is denominated, in Scripture and in the Roman and Continental law, usury. Usury appears to have been prohibited at Rome in the first ages of the commonwealth, but it was afterwards sanctioned by the law, as appears from numerous passages in the Code and Digest (Cod. lib. 3, tit. 1; lib. 4, tit. 32, lex 27; lib. 12, tit. 6, lex 26; lib. 50, tit. 16, lex 121). In common-law whatever exceeded the legal rate of interest was termed usury, and not the mere act or contract of lending out the money for hire" (Addison on Cont. (2d Am. from 4th Eng. ed.) 417). But there was no such offence as usury at common-law, Tyler on Usury, 64; see, however, Ord on Usury, 17. See the early usury laws in England set forth and commented upon in an interesting work, Murray's Hist. of Usury (Phila. 1866), 44-62. Brokers were likewise punished for usury by stat. 13 Eliz. c. 8, § 4; and by stat. 12 Anne, st. 2, c. 16, they were to suffer imprisonment for half a year for the offence. As to the policy and object of this statute, see per Lord Redesdale, *Drew vs. Power*, 1 Sch. & Lef. 194,

195; per Best, C. J., *Anonymous*, 3 Bing. 196; Murray, Hist. of Usury; *Lloyd vs. Williams*, 3 Wils. 259.

<sup>1</sup> Those States which are now understood to have statutes against the taking of unlawful interest are Alabama, Delaware, Illinois, Iowa, Kansas, Louisiana, Missouri, New Jersey, New York, North Carolina, Virginia, and Wisconsin; while in Pennsylvania, Michigan, Mississippi, and some other States the rate of interest is prescribed with a provision that if more is agreed to be taken, the excess shall be forfeited. In some of the States the rate may be agreed upon by the parties up to ten or twelve per cent. This is so of Illinois, Indiana, Iowa, Texas, and Wisconsin. In California the rate by law is ten per cent.; but the parties may agree, by special contract, at any rate whatever. In New York usury vitiates and destroys the entire contract, and both principal and interest are lost thereby; and one of the severest cases upon the subject is *Knickerbocker Life Ins. Co. vs. Nelson*, 87 N. Y. 154. In that State the prohibition against usury is enforced by a provision that any person violating the law shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$1000, or imprisonment not exceeding six months, or both (1 Rev. Stat. 772, § 6).

In relation to contracts affected by any usurious consideration, the general rule is that they are void in whatever form or garb the vice may appear. Sometimes the interest is lost, and sometimes the entire principal, but this mainly depends upon the severity of the laws in force where the parties happen to contract. There appears to be some conflict among the writers as to whether usury did or did not exist at common-law, but upon the merits of that contention it is unnecessary for the purposes of this work to pass any opinion, further than to say that the law in this country and in England has always found its strongest sanction in positive legislative enactments. It has been decided, however, that unless there is a law which limits the rate of interest to be charged for the use of money, there can be no usury.<sup>1</sup> Owing to the fact that the existence of usurious contracts is, as a general thing, zealously concealed by the parties under the guise of *bona fide* transactions, the courts have always been compelled to show the utmost ingenuity in tracing them out; but the principle upon which such contracts are sifted by the courts is to consider whether the particular transaction is really a sale of goods or stocks, or a corrupt loan of money irrespective of the form under which it may appear. As was said by the late Judge Allen,<sup>2</sup> "The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise; but none have been allowed to prevail. Courts have been astute in getting at the true intent of the parties and giving effect to the statute."

The rule is established that where a party loans another stock at its face value, and the stock is selling then below that figure, or sells the stock for less than its face value, and loans the produce thereof for the face value of the same, or for more than its real value at the time, reserving interest

<sup>1</sup> Newton vs. Wilson, 31 Ark. 484.

<sup>2</sup> Quackenbos vs. Sayre, 62 N. Y. 346.

thereon, the contract is clearly a loan of money, and is usurious and void.

Thus, to cite an early case, where the defendant lent the plaintiff a sum of money by selling out £1000 South Sea annuities which at that time were under par, and sold at a loss of £76 upon the whole, and paid the plaintiff the money and took a mortgage from him for £1000, at 5 per cent. interest, all of which plaintiff paid, the court, on a bill subsequently brought *inter alia* to recover the £76, etc., held the transaction to be a shift within the statute of usury, and directed the defendant to repay the difference between the price at which the stock was sold and its face value.<sup>1</sup>

So if several securities be given upon a usurious contract, one for the *principal* and a different one for the *interest*, both are void;<sup>2</sup> and promissory notes given upon a loan of stock above its real value are void.<sup>3</sup>

And, in *Parker vs. Ramsbottom*,<sup>4</sup> Bayley, J., laid down the rule as follows: "The original contract was for the return of the stock lent. That was a legal bargain. The stock, when originally sold, produced £10,083; but in September, 1815, it was worth only £8437, and therefore, when the new bargain was made, P. lent a thing of the value of £8437, and stipulated for a return of \$10,083, with 5 per cent. interest on the latter sum. That was clearly usurious."

Perhaps one of the best-known cases on this subject is *Doe vs. Barnard*. There the mortgagee, in an action of ejectment, was called, and stated that, when he applied to plaintiff's testator for the loan, the latter stated that all his money was in the funds, and that to sell out his stock then at 73 would result in considerable loss; but that if the mortgagor would

<sup>1</sup> *Moore vs. Battie*, Amb. 371.

<sup>3</sup> *Archer vs. Putnam*, 12 Smed. &

<sup>2</sup> *Roberts vs. Trenayne*, Cro. Jac. M. (Miss.) 286.

508; *White vs. Wright*, 4 B. & C. 273.

<sup>4</sup> 5 B. & C. 257; s. c. 3 D. & R. 138.

take it at 75 he should have the sum wanted; and thereupon the latter received £1500 on those terms in stock valued at 75, which he sold on the same day at 72½, at a loss of nearly £60; and it was held by Lord Kenyon that the transaction was usurious.<sup>1</sup>

So in a recent case in the State of New York,<sup>2</sup> which the Court of Appeals held was not distinguishable, in its minutest circumstances, from that of *Doe vs. Barnard*, where, upon application to one for a loan of money, he declined, but offered to and did nominally sell to the applicant, upon a credit, certain railroad bonds at an exorbitant price, which he knew the latter did not want and could only use as a substitute for and as a means of raising the money, the transaction was considered not as a *bona fide* sale, but as a usurious loan. The court strongly condemned the whole transaction as a plain and most palpable attempt to evade the statute of usury by an old and worn-out contrivance.

And where the directors of a bank proposed to sell defendant 100 shares of bank stock at par (\$100 each), for the price whereof they agreed to renew and discount his note for \$10,000, secured not by a pledge of the stock, as defendant had offered, but by other persons joining him in the note as makers, etc., the note to be regularly renewed every 60 days, and the discounts paid according to the custom of the bank for and during the term of 18 months; and also that S. should have a loan of \$2500 for the same term, etc.; to which defendant assents, and the notes are accordingly made and discounted, defendant and the directors both knowing that the utmost value of the stock in the market at the time was but \$80 per share—held, this was a sale of the stock at an exor-

<sup>1</sup> *Doe vs. Barnard*, Esp. N. P. Cas. 11. See also *Eagleson vs. Shotwell*, 1 Johns. Ch. 536; *Smart vs. Mechanics' Bank*, 19 Johns. 496; *Valley Bank vs. Stribling*, 7 Leigh, 26.

<sup>2</sup> *Quackenbos vs. Sayre*, 62 N. Y. 344.



bitant price, coupled with a loan of money, arising out of a proposition to borrow money; the sale and the loan one entire contract, inseparably connected with each other, and the one made dependent on the other; and the transaction and defendant's notes made and discounted by the bank in pursuance of the agreement were usurious.<sup>1</sup>

In *Bernard vs. Young*<sup>2</sup> the M. R. said: "The case of *Forrest vs. Elwes*<sup>3</sup> differs from this in the very point in which I conceive the usury to consist. In that case the objection, though at first made, was properly given up; as though it is true, if the stock had risen the lender might have had more than principal, then legal interest; yet on the other hand, if it had fallen, he would have had less, as he had no option to have stock or money; but the borrower could have discharged himself by merely replacing the stock. Here the security is of this kind. The lender is, at his election, to have his principal and interest, or to have a given quantity of stock transferred to him. His principal never was at any hazard, as he was at all events sure of having that with legal interest, and had the chance of an advantage if the stock rose. *It was usurious to stipulate for that chance.* In fact, the stock did rise, and if the contract had been performed he would have had principal and interest and a very large premium. Though not probably so intended, this is, in fact, an usurious contract."<sup>4</sup>

So in *White vs. Wright*,<sup>5</sup> the lender of stock, besides reserving to himself the dividends by way of interest, took the option of deciding at a future day whether he would have the stock replaced, or the sum produced by the sale of it repaid to him in money, with five per cent. interest; and it was held that this bargain was usurious, and that it made no dif-

<sup>1</sup> *Valley Bank vs. Stribling*, 7 Leigh, 26.

<sup>2</sup> 17 Ves. 44.

<sup>3</sup> 4 Ves. 492.

<sup>4</sup> See also *Chippendale vs. Thurston*, 1 Moody & M. 411; *Cleveland vs. Loder*, 7 Paige, 557.

<sup>5</sup> 4 B. & C. 273.

ference whether the whole of the agreement was contained in one instrument, or whether the lender procured the execution of two instruments, by one of which he might compel the replacing of the stock, by the other the payment of the money and the interest. Bayley, J., and his associates, were clearly of the opinion that the case fell within the statute. "A party," said he, "may lawfully lend stock to be replaced, or he may lend the produce of it as money, or he may give the borrower the option to repay it either in the one way or the other. But he cannot legally reserve to himself a right to determine in future which it shall be. It is not illegal to reserve the dividends by way of interest for stock lent, although they may amount to more than five per cent. on the produce of it, for the price of stock may fall, and then the borrower would be a gainer."<sup>1</sup>

But a loan at more than the legal rate of interest is not usurious if by the repayment of the principal the borrower may avoid the interest.<sup>2</sup> Nor is a mere loan of stock usurious, nor the payment of the dividends in the meantime, though they exceed the legal rate of interest.<sup>3</sup> Nor is the loan of money usurious produced by the sale of stocks, on an agreement that the borrower shall replace that stock on a certain day, *or repay money* on a subsequent day, with such interest in the meantime as the stock itself would have produced, though the interest *exceed five per cent.*, unless the transaction be colorable, and a mere device to obtain more than legal interest, which in this case was negatived by the finding of the jury.<sup>4</sup> So a loan of chattels is not within the usury laws unless contrived as a disguise for loan of money;

<sup>1</sup> See *Boldero vs. Jackson*, 11 East, 611; *Robbins vs. Dillaye*, 4 Ab. (N. Y.) Ct. App. Dec. 71.

<sup>2</sup> *Roberts vs. Trenayne*, Cro. Jac. 508.

<sup>3</sup> *Tate vs. Wellings*, 3 T. R. 531.

<sup>4</sup> *Id.* See also *Maddock vs. Rumball*, 8 East, 303. In this case the court agreed there was no usury, as the amount of the sum to be paid by the defendant depended upon a con-

and on such a loan, if *bona fide*, it is immaterial what compensation is reserved.<sup>1</sup>

So an agreement for the purchase of stock, to be transferred at a future day, at a price below the then value is not usurious.<sup>2</sup> Lord Ellenborough said that, whatever remedy the defendant might have in equity on the ground of this being a catching bargain, he had none at law: contingency on the thing purchased was incompatible with the idea of usury, in which the principal must always be certain. It was admitted that if the stock, when transferred to the plaintiff, would be worth but £160, it would not be usury; that the stock would suffer that most extraordinary depreciation was very improbable, but still it was within the reach of possibility. He therefore could not say that there was not some contingency in the transaction; and if so, the contract was not usurious. Where there was a transfer of stock by way of loan upon bond, with condition to replace the stock six months after date, and in the meantime to pay interest at *five per cent.*, the stock not being replaced, and being depreciated, the obligee is entitled to the value of the same at the time of the transfer, with interest at five per cent.<sup>3</sup> A loan of certificates of deposit worth in market much less than par, on an engagement to repay the face with interest, is usurious.<sup>4</sup> But a transaction by which a loan was procured by A through B from C and D, on pledges of stock transferred to B, was held separable, so that usury on the part of C did not affect the transaction as to D.<sup>5</sup>

tingency; that this was no more usury than an agreement to replace stock lent, which, though once contended to be usury if more than the principal and legal interest were thereby obtained, had been long settled to be legal. See *Tate vs. Wellings*, 3 T. R. 531; *Pike vs. Ledwell*, 5 Esp. 164.

<sup>1</sup> *Brell vs. Rice*, 5 N. Y. (1 Seld.) 315.

<sup>2</sup> *Pike vs. Ledwell*, 5 Esp. 169.

<sup>3</sup> *Forrest vs. Elwes*, 4 Ves. 492.

<sup>4</sup> *Farmers' Loan & Trust Co. vs. Carroll*, 5 Barb. 613; see *Schermerhorn vs. Talman*, 14 N. Y. 93.

<sup>5</sup> *Little vs. Baker*, Hoffm. (N. Y.) Ch. 487.

So it is held that a *bona fide* charge by a banker or a Stock-broker of a commission or extra sum for expense or trouble is not usurious. To render a transaction usurious, there must be an unlawful or corrupt intent confessed or proved.<sup>1</sup> And a transfer of stock as a lawful commission for services in procuring it, not as a bonus for a loan, is not usurious.<sup>2</sup> And it has been held in New York that a Stock-broker can recover from his Client usurious interest which the Broker was compelled to pay for money borrowed in order to carry the Client's stocks, and which the latter agreed to pay; and that, as between the parties, the transaction did not amount to an exaction of usury so as to avoid the same. In such a case the Broker merely acts as an agent of the Client, and not as a principal.<sup>3</sup> So the custom of Brokers to debit and credit interest monthly on balances does not infect a contract to purchase and sell stocks with usury.<sup>4</sup> And the custom of bankers, on discounting paper, to exact payment of interest in advance does not render the paper usurious.<sup>5</sup>

A corrupt agreement for the forbearance of money must be strictly pleaded according to the fact.<sup>6</sup> And the question whether the transaction is fair and honest, or whether it is a colorable payment of usury upon a loan, etc., or to obtain unlawful interest, is a question for the jury.<sup>7</sup> Where usury is

<sup>1</sup> Nourse vs. Prime, 7 Johns. Ch. 69; Johns. 162; Ins. Co. vs. Sturges, 2 Woodruff vs. Hurson, 32 Barb. 557. Cow. 664; Bank vs. Wager, id. 712, 766.

<sup>2</sup> David vs. Illius, 9 How. Pr. 450.

<sup>3</sup> Smith vs. Heath, 4 Daly (N. Y.), 123. See also Robinson vs. Norris, 51 How. Pr. 442. As to when the court will continue an injunction where the contracts made by the Broker in relation to commissions on the loan of stocks are alleged to be mere covers for usury, see Caldwell vs. Warehouse Co. 1 Hun (N. Y.), 718.

<sup>4</sup> Hatch vs. Douglas, 16 Am. Law Rev. 181.

<sup>5</sup> Manhattan Co. vs. Osgood, 15

<sup>6</sup> Tate vs. Wellings, 3 T. R. 531; National Bank vs. Lewis, 75 N. Y. 516; Banks vs. Van Antwerp, 15 How. Pr. 29; Mosier vs. Norton, 83 Ill. 519.

<sup>7</sup> Tyler on Usury, 92; Tate vs. Wellings, supra; Carstairs vs. Stein, 4 Mau. & S. 192; Rose vs. Dickson, 7 Johns. 196. When jury may infer usury in a note given for sale of stock, see Black vs. Ryder, 5 Daly,

304.

not proved by direct evidence, it can be proved by inferences from the evidence given; and it seems to be the province of the jury to draw the proper inferences from the evidence. In other words, it is their duty to decide not only on *proved*, but *inferred*, facts.<sup>1</sup> So where the facts in regard to an alleged usurious transaction do not show usury, but are such that the jury could infer that they were intended as a cover for usury, it is competent to ask the lender whether he intended to take usury.<sup>2</sup> So parol evidence against the face of a bond to prove a usurious agreement has been held admissible.<sup>3</sup>

The court will continue an injunction granted to restrain a party from selling securities pledged as collateral to a loan, the complaint averring and the answer denying that the contracts in relation to commissions were designed to be, and were, mere covers for usury, when it appears that, in addition to seven per cent. for interest and all expenses, and disbursements attending the care and custody of the collaterals, and eight per cent. on the gross proceeds of a sale, if one was made, a sum equal to twenty-four per cent. per annum on the loan is charged for the care and custody of the bonds and stock certificates pledged, and this under an agreement which devolves all risk of loss on the borrower. It is impossible to say that the jury would not be justified in finding that this transaction was a cover for usury.<sup>4</sup> And although there may be a defence to an action at law in a matter of usury, yet a bill will hold to compel the giving-up of securities—certificates of deposit—left as collateral security for the

<sup>1</sup> Valley Bank vs. Stribling, 7 Leigh, 19 Johns. 496; Cleveland vs. Loder, 57. 7 Paige, 357; Slosson vs. Duff, 1 Barb. 432; Codd vs. Rathbone, 19 N. Y. 37.

<sup>2</sup> Black vs. Ryder, 5 Daly (N. Y.), 304. When use of proceeds of collaterals constitutes usury, see Morgan vs. Mechanics' etc. Banking Assoc. 19 Barb. 584.

<sup>3</sup> Atkinson vs. Scott, 1 Bay (S. C.), 307. As to what constitutes usury in sale of uncurrent bank-notes and bills, see Pratt vs. Adams, 7 Paige, 615; Smart vs. Mechanics' etc. Bank, 4 Caldwell vs. Warehouse Co. 1 Hun (N. Y.), 718.

usurious debt, and an injunction will be a consequence to stay the action.<sup>1</sup> Finally, when a usurious loan has been made, a transfer of valid securities to the lender, as collateral security for the payment of such loan, is void; and he cannot enforce them even against the maker of them.<sup>2</sup> But a valid security is not tainted by being hypothecated by its owner for a usurious loan; and, were it otherwise, redeeming it purges the taint.<sup>3</sup>

## *VI. Statute of Frauds.*

### *(a.) Contracts for Sale of Stocks not within English Statute.*

In the latter part of the seventeenth century, a statute was passed in England which, with certain modifications and amendments, has in the course of time become a component part of the law of nearly every state and country where the English language is spoken. This is the celebrated statute of Charles the Second passed in 1677, and entitled "An Act for the Prevention of Frauds and Perjuries."<sup>4</sup>

The objects which the statute of Charles had in view are perhaps too well known to require any comments. Hence, in the present work, we shall merely concern ourselves with decisions arising under the act as to the validity of contracts for the purchase and sale of stocks and shares. And the question presents itself, Do such contracts come within the 17th section of this important enactment? That section reads as follows: "And be it enacted that from and after the 24th day of June, 1677, no contract for the *sale of goods, wares, and merchandise* for the price of £10 sterling or upwards shall be

<sup>1</sup> *Peters vs. Mortimer*, 4 Edw. Ch. 279.

<sup>3</sup> *Warner vs. Gouverneur*, 1 Barb. (N. Y.) 86.

<sup>2</sup> *Western Reserve Bank vs. Potter*, Clarke (N. Y.), 432.

<sup>4</sup> 29 Car. II. c. 3.

allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

Question has also arisen as to whether these contracts were within the 4th section of the statute concerning lands, the decisions relating to which will be referred to hereafter.

In England, it seems that the law is now settled, as a matter of judicial history beyond all cavil, that contracts for the sale of stocks are not within the Statute of Frauds, and consequently are not required to be in writing; and this, in brief, is based upon the fact that the English courts do not consider that the terms "stock" and "shares" come within the meaning or spirit of the words "goods, wares, and merchandise," and that they are mere *choses in action*, of which there cannot be a part delivery. As the law is so well settled in that country, it is only deemed necessary to refer to a few of the most prominent cases where the question has been considered.

The earliest case in England in which the question arose is that of *Pickering vs. Appleby*,<sup>1</sup> decided about 1720, where the point was elaborately discussed and not decided, there being an equal division of the court. The action was one of *assumpsit* upon a contract to sell shares of stock in a copper mining company alleged to have been transferred and sold to the defendant, who pleaded *non assumpsit*. On the trial it appeared that there was no memorandum in writing of the contract or any earnest paid; and it was doubted by King, C. J., whether such shares were within the purview and intent of the act, and whether plaintiff could recover. Al-

<sup>1</sup> 1 Com. 354; s. c. 2 Eq. Abr. 50, pl. 27.

though the arguments of counsel were most elaborate, both pro and con, the books fail to show what the views of the judges were, save that they were divided in opinion, and the case was adjourned.

About five years after, *Colt vs. Nettervill*<sup>1</sup> came before the Lord Chancellor, involving precisely the same question. There a bill was brought to compel the defendant to perform an agreement to take certain stock, and he pleaded the Statute of Frauds; but the Lord Chancellor said the point had already been before all the judges, who were equally divided—six against six—and that therefore it was too difficult for determination upon demurrer. Counsel insisted that the word “goods” in the statute was extensive enough to cover the contract, and that at least it was within merchandise; for every vendible thing was said to be merchandise, and that stock was a thing vendible, and in the year 1720 was the most usual merchandise which people dealt in. It was further contended that Lord Cowper had already determined such a contract to be within the statute. The point, however, was not decided.

About the same time occurred the case of *Mussell vs. Cooke*,<sup>2</sup> which was likewise a bill for specific performance of a contract for the sale of stock. There A agreed with B’s Broker for £5000 South Sea stock; the Broker, according to usage, made an entry of this agreement in his pocket-book; and the court held that it was within the statute. The plea was, however, overruled for not stating that the agreement had not been reduced to writing.

Following this, we find a like decision in *Crull vs. Dodson*; <sup>3</sup> but it does not appear there that the Statute of Frauds came

<sup>1</sup> 2 P. Wms. 304.

<sup>2</sup> Prec. Ch. 533.

<sup>3</sup> Macn. Sel. Cas. Ch. 114. See also *Calvin vs. Williams*, 3 Har. & J.

38, where it was decided in Maryland, in which State the statute prevails, that the sale of bank stock is within the statute of 29 Car. II. c. 3.



before the court but incidentally; for in a note to the case<sup>1</sup> it is said that, "independently of this consideration [the Statute of Frauds], the case could not have been decided on any other grounds than that of public policy." The facts showed that the defendant, a Broker, had certain stock in his hands belonging to the plaintiff, who said he would sell when it reached £200. The defendant, when the stock had gone beyond that price, told plaintiff that he sold £1000 of it to one at £200, and £500 to another, who was his partner, and the rest he had taken himself at that price, which was clearly a breach of trust on his part; and entries were made in his books accordingly, but in such a manner that it looked as if done after the use of the stock, and only designed as an evidence in case of dispute. The plaintiff had a decree, which was affirmed upon the ground that the transaction was a fraudulent one; and the court said: "On the sale, if any, he [the Broker] should have taken earnest; for it has been determined here that such a bargain is within the Statute of Frauds, and without earnest only *nudum pactum*."

Both of these cases are, however, disregarded as authorities in England; and they are clearly overruled by the great mass of subsequent decisions to the contrary, some of which we will give, as they conflict with the weight of authority in the United States upon this subject.

In *Humble vs. Mitchell*,<sup>2</sup> which is one of the leading cases upon the subject, the plaintiff brought assumpsit for not transferring shares in a joint-stock banking company, and the defendant interposed the Statute of Frauds. But it was held that a contract for the sale of such shares of £10 value is not a contract for the sale of goods, wares, and merchandise, so as to require a written memorandum within the 17th section of

<sup>1</sup> Macn. Sel. Cas. Ch. 106.

<sup>2</sup> 3 Per. & Dav. 141; s. c. 11 Adol. & El. 205.

the statute. Lord Denman, C. J., said: "It appears that no case has been found directly in point; but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the Statute of Frauds and in the Bankrupt Act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon that act cannot be reasonably extended to the Statute of Frauds. Shares in a joint-stock company like this are *mere choses in action*, incapable of delivery, and not within the scope of the 17th section. A contract in writing was therefore unnecessary."<sup>1</sup>

The same views were expressed in another well-known case, where the subject involved was railway shares.<sup>2</sup> The action was specific performance to compel a transfer of the shares. The vice-chancellor said: "In my opinion, this is a case to which the 17th section of the Statute of Frauds does not apply, because it is impressed upon my mind that in the decisions which have been made with respect to the 17th section it has been held to apply only to goods, wares, and merchandise, which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be in effect personal estate, but not personal estate of the quality of goods, wares, and merchandise, within the meaning of the 17th section."

So in another case, where it was decided that a sale of railway scrip was not a sale of goods, wares, and merchandise, within the meaning of the exemption in the Stamp Act,<sup>3</sup> the

<sup>1</sup> See also, to same effect, *Haseltine vs. Siggers*, 1 Wels. & Hurl. & Gord. 856.

<sup>2</sup> *Duncuft vs. Albrecht*, 12 Sim. 189.

<sup>3</sup> 53 Geo. III. c. 184.

defendant contended that shares of that description had been held to be goods and chattels under the Bankrupt Act; but Pollock, C. B., stated that under that act all the rights of the bankrupt passed under the word "chattels" (which the Statute of Frauds does not contain). The court said: "Scrip and shares are not merchandise; they are merely bought and sold by parties who wish to speculate upon their right to obtain shares in the companies as soon as the latter are formed."<sup>1</sup>

It has likewise been held in England that these contracts do not come within the 4th section of the statute relating to contracts concerning lands. Stocks or shares have consequently been held not to be interest in lands or within the Mortmain Act.

In *Watson vs. Spratley*,<sup>2</sup> which is perhaps the leading case upon the subject, the plaintiff contracted to sell defendant certain shares in a joint-stock mining company. The plaintiff, it appears, made a memorandum of the sale, but there was no note in writing signed by the defendant. The mode of transferring shares was by a certificate of sale, which authorized the substitution of the vendee's name upon the books of the company in the place of the vendor. It was decided that the shares were not an interest in land within the 4th section of the act, and that there was no difference in this respect between an incorporated and an unincorporated company. The court said that the interest which the holder of the shares in such a company had was not a legal title to the lands which were vested in the company, but merely the right to receive the dividends payable on his shares—a right to his just proportion of the profits arising from the employment of

<sup>1</sup> *Knight vs. Barber*, 16 L. J. Ex. 249. As to scrip, see 18; 16 Mee. & W. 66; *Watson vs. Goodwin vs. Roberts*, 45 L. J. Ex. 222. See also, as to railway shares, *Hargreaves vs. Parsons*, 13 Mee. & W. 561; *Bowlby vs. Williams*, 3 Har. & J. 38. *Bell*, 3 C. B. 284, 291; *Tempest vs.*

<sup>2</sup> 10 Ex. 222.

the joint stock, consisting, indeed, partly of land; but while he holds his shares he has no interest or separate right to the land or any part of it. The court based its decision upon the cases cited in the note,<sup>1</sup> and upon the decision per Lord Langdale in *Sparling vs. Parker*,<sup>2</sup> upon the Mortmain Act,<sup>3</sup> prohibiting the devise of land, etc., to charitable uses, where the court held that a devise of shares was good, as they were not an interest in land within that act: "Now, this case seems to me to be in point; for if a share in an unincorporated joint-stock dock company is not an interest in land for the purpose of a devise to a charitable use, neither it nor a share in a joint-stock mining company can be an interest in land for the purpose of a contract within the 4th section of the Statute of Frauds."<sup>4</sup>

And it does not lie in the mouth of a Client to interpose the Statute of Frauds to transactions which he has authorized his Broker to make for him.<sup>5</sup> Thus where plaintiff had at defendant's request entered into a contract for the purchase of Spanish bonds, to be delivered at a future day, and had afterwards paid the price, it was held that the defendant could not, in answer to an action for money paid to his use, object that the contract was not in writing.<sup>6</sup>

So a Client who gives a verbal order to his Broker to purchase certain stock, in pursuance of which the Broker purchases the stock, and the same is on the following day

<sup>1</sup> *Bligh vs. Brent*, 2 Y. & C. 294; *W. 422*; *Bligh vs. Brent*, 2 Y. & C. Duncuft vs. Albrecht, 12 Sim. 189; 268). See also *Powell vs. Jessop*, 36 Myer vs. Perigal, 2 De G. M. & G. Eng. Law & Eq. 274, decided upon 599. See also *Walker vs. Bartlett*, 18 authority of *Watson vs. Spratley*, C. B. 845. 10 Ex. 222. See, however, a contrary

<sup>2</sup> 9 Beav. 450. See also *Hilton vs. Giraud*, 1 De G. & Sm. 183.

<sup>3</sup> 9 Geo. II. c. 36.

<sup>4</sup> Railway shares are not an interest in land within the 4th section (*Bradley vs. Holdsworth*, 3 Mee. &

decision in Ireland as to mining shares being real estate, *Boyce vs. Green, Batty*, 608.

<sup>5</sup> *Genin vs. Isaacson*, 6 N. Y. Leg. Obs. 215.

<sup>6</sup> *Pawle vs. Gunn*, 4 Bing. N. C. 445.

delivered to and paid for by him, cannot insist that the contract is void, on the ground that no part of the stock was delivered and no money paid at the time of giving the order. The delivery by the seller, and the acceptance by the Broker acting as the agent of the buyer, render the contract valid and binding.<sup>1</sup>

*(b.) Contracts for Sale of Stock Held to be within Statute of Frauds in the United States.*

If the English decisions are so decided upon this question, the American cases seem to be equally decisive that verbal contracts for the sale of stocks are within the Statute of Frauds; and in this respect do not follow, but rather oppose, the English authorities. There is, however, some conflict among the decisions in this country. The statute of Charles the Second was introduced at an early date into nearly all the States, but in some of them the original language of the statute has been so modified as expressly to include stocks and shares. This, for example, is the case with the statutes in force in the States of New York and Florida. The New York statute<sup>2</sup> speaks of the words "chattels or things in action," which would clearly include stock and shares of any kind; while the statute of Florida, in addition to the words "goods, wares, and merchandise," uses the words "personal property," which it has been held is comprehensive enough to include shares of stock in an incorporated company.<sup>3</sup> Similar modifications of the old statute have been made in other States, while in some few its provisions remain in full force and effect.<sup>4</sup>

One of the earliest cases in the United States upon the sub-

<sup>1</sup> Rogers vs. Gould, 6 Hun (N. Y.), 229.

<sup>2</sup> 2 Rev. Stat. 140.

<sup>4</sup> See Browne on Frauds (4th ed.), Appendix, where all these statutes

<sup>3</sup> Ins. & Trust Co. vs. Cole, 4 Fla. are given in full.  
360.

ject is *Tisdale vs. Harris*,<sup>1</sup> where the Supreme Court of Massachusetts, in 1838, made a thorough examination of the question, and came to the conclusion that contracts for the sale of stocks were within the Statute of Frauds of that State. In that case the action was assumpsit on a contract by which defendant agreed to sell plaintiff 200 shares in the stock of a Connecticut corporation at \$10.80 per share. The object of the suit was to recover \$300, the amount of a dividend declared on the shares. The court held that the contract was within the statute, which was copied precisely from the English statute. The court, per Shaw, C. J., considered it somewhat remarkable that the question had not been definitely settled in England, and cited the early English cases<sup>2</sup> as showing that the better opinion seemed to be in that country that shares in incorporated companies were within the statute as goods or merchandise, and it was considered that the weight of authority in modern times was that such contracts are not valid unless evidenced by some writing properly subscribed. The court said: "Supposing this a new question now for the first time calling for a construction of the statute, the court are of opinion that, as well by its terms as its general policy, stocks are fairly within its operation. The words 'goods' and 'merchandise' are both of very large signification. *Bona*, as used in the civil law, is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common-law. The word 'merchandise,' also including, in general, objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies." The court considered that the English cases which decided that buying and selling stocks did not subject a person to the operation of the bankrupt law did not bear much upon the

<sup>1</sup> 37 Mass. 13.

533; *Crull vs. Dobson*, Macn. Sel.

<sup>2</sup> *Pickering vs. Appleby*, 1 Com. Cas. Ch. 114.

354; *Mussel vs. Cooke*, Prec. Ch.

general question, as the bankrupt acts were deemed to be highly penal and coercive, and tended to deprive a man in trade of all his property: the construction in question only decided that by taking such shares merely as an investment a man should not be deemed a merchant within the act. The court considered the argument, that the statute only applied to goods a part of which may be delivered, to be a rather narrow and forced construction. In conclusion, it was said: "There is nothing in the nature of stocks or shares in companies which in reason or sound policy should exempt contracts in respect to them from these reasonable restrictions, designed by the statute to prevent frauds in the sale of other commodities."

We have quoted from this decision at length, as it has been followed by the courts of many other States as a settled authority, and in opposition to the prevailing rule in England. The case of *Humble vs. Mitchell*,<sup>1</sup> holding the contrary, was not decided until 1839; but it is safe to predict that had it been before the court in *Tisdale vs. Harris* the decision there might have been different, especially when it is considered that the statute under consideration by that court was precisely similar to that of Charles the Second. *Baldwin vs. Williams*,<sup>2</sup> where a sale of a promissory note was subsequently held to be within the Statute of Frauds, was decided upon the authority of the latter case, although *Humble vs. Mitchell* was then known to the court and recognized as an opposing authority.<sup>3</sup>

Recently, in Massachusetts, however, the court has had occasion to re-examine the authorities somewhat closely and more

<sup>1</sup> 3 Per. & Dav. 16.

<sup>2</sup> 44 Mass. 363. To the contrary on this point are *Hudson vs. Weir*, 29 Ala. 294, and *Whittemore vs. Gibbs*, 24 N. H. 484, where the court refused to follow the Massachusetts case.

<sup>3</sup> See also *North vs. Forrest*, 15

Conn. 400, and *Pray vs. Mitchell*, 60 Me. 430, where it was decided that a contract for the sale of shares of a joint-stock company is within the statute, following *Tisdale vs. Harris*, *supra*.

critically than heretofore, in a case where it was contended that an agreement for the sale of a mere interest in an invention, before letters-patent were obtained, is a contract for the sale of goods, wares, and merchandise within the statute.<sup>1</sup> But the court decided that it was not within the statute, and clearly limited the doctrine laid down in the early cases. Gray, C. J., after referring to the early English cases and to *Tisdale vs. Harris*, said: "But the modern decisions in England are the other way, and the decisions in other States are at variance."<sup>2</sup> The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form. To include in them an incorporeal right or franchise granted by the government . . . *would be unreasonably to extend the meaning and effect of words which have already been carried quite far enough.*"

Again, in a still later case,<sup>3</sup> Ames, J., in upholding the objection, upon the above authorities, that a verbal contract for the sale of shares was within the statute, referred to the conflict of the decisions of other courts upon this point, and specially referred to *Somerby vs. Buntin*;<sup>4</sup> but said "we do not feel called upon to overrule the two decisions above cited."<sup>5</sup>

In *Beers vs. Crowell*,<sup>6</sup> the court said: "If there be any doubt whether stocks, forming so large and valuable a part of the personal property of the country as they do, and subject as they are to such frequent contracts and transfers, be within the statute, there can be, it should seem, little doubt but that bills, notes, and checks, which are mere securities, evidences of debt, and choses in action, are not included."

<sup>1</sup> *Somerby vs. Buntin*, 118 Mass. 279.

<sup>4</sup> 118 Mass. 279.

<sup>2</sup> Citing *Browne on Frauds*, § 296-298; 1 Chit. Cont. (11th Am. ed.) 541, note.

<sup>5</sup> Referring to *Tisdale vs. Harris*, 37 Mass. 9, and *Baldwin vs. Williams*, 44 Mass. 365.

<sup>3</sup> *Boardman vs. Culter*, 128 Mass.

<sup>6</sup> *Dudley*, 28.



Other cases upon this subject, which are for the most part *dicta*, will be found in the notes.<sup>1</sup>

There are some cases which have arisen under the statute of New York State which, however, by reason of their importance to Stock-brokers, deserve special attention. Thus it has been held that the Statute of Frauds of that State cannot be raised by a Client to defeat the claim of his Broker for moneys advanced in the purchase of the stock merely because the contract was a verbal one, and that the statute had no application to such a case.<sup>2</sup> So where a purchaser signs and delivers to the seller an agreement to buy certain stock upon terms specified, and the latter agrees by parol to sell upon the terms stated, there is a binding contract, which may be enforced against the purchaser.<sup>3</sup> So where the rules of the Stock Exchange make all verbal agreements or contracts between its members binding, it was held that the defendants' Stock-brokers, being bound by such rules, could not interpose the Statute of Frauds as a defence to an action brought against them to recover certain bonds stolen from plaintiffs and deposited with defendants as margin.<sup>4</sup>

In *Tomlinson vs. Miller*,<sup>5</sup> the plaintiff and defendant agreed verbally with a third person to exchange bonds of a railroad company for its stock, it being understood between the plaintiff and defendant that they should furnish the bonds to be

<sup>1</sup> See *Weightman vs. Caldwell*, 4 Wheat. 89, note; *Walker vs. Supple*, 54 Ga. 178; *Riggs vs. Magruder*, 2 Cranch, 143. Bank stock held within statute, *Colvin vs. Williams*, 3 Har. & J. 38. Shares in turnpike company, *Welles vs. Cowles*, 2 Conn. 567, 577. Shares in railroad company held to be personal property, *Johns vs. Johns*, 1 Ohio St. 350; *Railroad Co. vs. Benedict*, 76 Mass. 212.

<sup>2</sup> *Rogers vs. Gould*, 6 Hun (N. Y.), 229; *Genin vs. Isaacson*, 6 N. Y. Leg. Obs. 215; see also *Rawle vs. Gunn*, 4

*Bing. New Cas.* 445. But a contract for the sale of gold is within the statute, and must be made in compliance therewith (*Peabody vs. Speyers*, 56 N. Y. 230).

<sup>3</sup> *Mason vs. Decker*, 72 N. Y. 595; aff'g 10 J. & S. 115; *Justice vs. Lang*, 42 N. Y. 493. Contra, it seems, is *Johnson vs. Mulry*, 4 Robt. (N. Y.) 401.

<sup>4</sup> *Brownson vs. Chapman*, 63 N. Y. 625; see, however, *Henderson vs. Barnewell*, 1 Y. & J. 387.

<sup>5</sup> 7 Ab. (N. Y.) n. s. 364.

given, and share the stock to be received in a certain proportion ; and that the defendant should attend to making the exchange, and should furnish all the bonds in the first instance, plaintiff subsequently to replace his share so advanced. Held, that though the agreement was void under the Statute of Frauds, for want of a written memorandum, yet, after the defendant had made the exchange on behalf of himself and plaintiff, in pursuance of the agreement, the Statute of Frauds had no application to the claim of the plaintiff on tendering the share of bonds to be furnished by him, to recover from the defendant the shares of the stock which defendant had received for him.

The court said: "This being the case, I am unable to see that the Statute of Frauds has any application to the case in hand. As between vendor and vendee, no writing is necessary to transfer the title to bonds or stock. Delivery of the bonds or of the certificate of stock under a parol contract of sale is sufficient to that end. Suppose that the verbal contract of exchange had been between P. and the plaintiff solely, and the plaintiff had requested the defendant, as his agent, to advance the bonds and complete the exchange, and the defendant had, in the name of the plaintiff, and avowedly as his agent, made the exchange with Patchin pursuant to the contract, advancing his own bonds for that purpose, what application could the Statute of Frauds have to the case?"

The question has also been considered as to what is not a sufficient memorandum to take the contract out of the statute. Thus, in *Johnson vs. Mulry*,<sup>1</sup> it was held that a mere entry in a book, by the clerk of the Stock-brokers of a vendor by whom a sale of choses in action has been made, of such sale, although assented to verbally by the buyers as correct, is not a sufficient reduction of the contract to writing, or written

<sup>1</sup> 4 Robt. (N. Y.) 401.

memorandum, or note thereof, signed by the parties, within the statute. It was also held in this case that the necessity of having such contract in writing was not dispensed with by the Stock-jobbing Act,<sup>1</sup> providing that contracts for the sale of stock shall not be void or voidable by reason of a want of consideration or the non-payment of a consideration, or the non-possession or ownership by the vendor, at the time of making such contracts, of the certificates or other evidence of such shares.<sup>2</sup> But the court seemed to be of opinion that if the purchase-money was to be deemed the consideration, or a part of the consideration, then the third subdivision of the statute had no application to the case, the payment having been rendered unnecessary by the act last cited.

But upon the point that there was no sufficient memorandum signed and subscribed by the parties, it would seem that this case cannot be considered as good law in New York, for, as we have seen, a contract for the sale of stock is sufficiently binding if signed by one party and accepted by the other.<sup>3</sup>

The New York statute was also construed, in the case of *Thompson vs. Alger*,<sup>4</sup> as to what is a sufficient part payment. There an oral contract was made in New York for the purchase of railroad stock, and afterwards the buyer paid a part of the agreed price to the seller, but finally refused to pay the balance and take the stock. In a suit to recover the residue of the agreed price, or damages for not performing the contract, it was contended by the defendant that the contract was void within that provision of the statute which provides that contracts or things in action shall be void "unless the buyer shall *at the time* pay some part of the purchase-money." The court, per Dewey, J., in repudiating this argument said: "These

<sup>1</sup> Laws N. Y. 1858, ch. 134.

<sup>3</sup> See *Mason vs. Decker*, 72 N. Y.

<sup>2</sup> See *Thompson vs. Alger*, 53 Mass. 595; *Justice vs. Lang*, 42 id. 493.

<sup>4</sup> 53 Mass. 428, 436.

payments were part of the purchase-money for the stock which Alger contracted to buy and Stone contracted to sell, and will take the case out of the operation of the Statute of Frauds unless the court sanction the ground taken by the defendant, that in order to take the case out of the statute such payment must have been made at the precise point of time when the parties made their original verbal agreement. No such doctrine has ever been applied to the English Statute of Frauds, nor to that of Massachusetts; nor could it seriously be urged as to either. It is only upon the peculiar language of the statute of New York that this point is relied upon in the defence." And this interpretation of the statute appears to have received the sanction of the courts of New York State in several recent cases.<sup>1</sup>

Where B, the owner of shares, agreed with A that he, B, in consideration of A's discharging B from his contract to sell such shares to A for the sum of \$3000, promised to pay A one half of the excess of such sum as he, B, should sell said shares for to a third party over \$3000, and B sold them to a third person for \$3200. In an action brought by A against B on such promise, it was held that the contract was not exempted from the operation of the Statute of Frauds on the ground of a part performance.<sup>2</sup>

So where there was a part performance of the contract by the payment of the money and delivery of the stock, after the action brought, these acts cannot be relied on to show a cause of action when the action was commenced.<sup>3</sup>

<sup>1</sup> See the decision commented upon in *Hunter vs. Wetsell*, 57 N. Y. 375; also s. c. 84 N. Y. 549, where it was held that where, after the making of an oral contract for the sale of goods, void under the Statute of Frauds, a payment is made thereon, and at the time of such payment the essential terms of the contract are restated, this takes the case out of the operation of the statute, and validates the contract. And where a check is delivered and received as a payment, which is good when drawn and is paid on presentation, this is a *payment at the time* within the meaning of said statute (2 Rev. Stat. 136, § 3, sub. 3), and satisfies its requirements.

<sup>2</sup> *North vs. Forest*, 15 Conn. 400.

<sup>3</sup> *Tisdale vs. Harris*, 37 Mass. 13.

In a recent case in New York<sup>1</sup> it was held that the furnishing of reliable information as to facts upon which the future price of a stock will depend was a sufficient consideration to uphold a verbal agreement or contract in relation to such stock; and that the information, being concededly of great value, was just as effective to take the case out of the Statute of Frauds as if a cash payment had been made. No authority was cited for this proposition, but it appears to have been based by the learned judge upon the principle that one who offers a reward for information is bound by his contract to the person who responds to his offer: then the contract was considered by the court as having been executed by the fact that the defendant assented to the same, and acted upon it by purchasing the stocks.

And where the plaintiff purchased certain shares of stock at a given price of the defendant, the latter agreeing to take it back and repay the plaintiff for the same on request—held, that the plaintiff having tendered back the stock and demanded repayment, the contract for the repayment was not within the Statute of Frauds, though not in writing. The court based its decision upon the fact that the contract sued upon was not an independent one for the resale of the stock from plaintiff to defendant, but was rather a part of the one by which plaintiff purchased the stock, and by which the purchase became a qualified and not an absolute one. The original contract was taken from the operation of the statute by a part performance, by the delivery of the stock, and by the payment of the money.<sup>2</sup>

<sup>1</sup> *White vs. Drew*, 56 How. Pr. (Sp. T.) 53. the same effect, *Allen vs. Aguirre*, 7 N. Y. 543.

<sup>2</sup> *Fay vs. Wheeler*, 44 Vt. 292. To

*(c.) When Statute must be Plead.*

In England, by statute,<sup>1</sup> where a contract is alleged in any pleading, a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether in reference to the Statute of Frauds or otherwise; and it has been decided that the statute must be pleaded,<sup>2</sup> and that a defence founded thereon cannot be raised by demurrer.<sup>3</sup> The rule seemed to be different in equity. And advantage may be taken of the statute by demurrer to the bill where a contract in writing is not alleged,<sup>4</sup> but this is perhaps obviated by the above statute.

It has been held in Vermont that the defence under the statute may be shown under the general issue or pleaded specially.<sup>5</sup> And the same rule prevails in New York,<sup>6</sup> save that, if the defendant admits the making of the contract in his pleading, he must specially allege the Statute of Frauds as a defence.<sup>7</sup> The objection to the statute may be taken in equity by answer to the bill denying the fact of the agreement.<sup>8</sup>

But where complainant sold defendant 200 shares of railway stock at a stipulated price, deliverable at a future day, and, to secure performance of the contract, each party deposited 100 shares of similar stock with Brokers, and when the contract matured defendant declared that he would not receive the

<sup>1</sup> Sup. Ct. Judicature Act Amendment, 1873; 38 and 39 Vict. c. 77, order xix. 23; Browne on Frauds (4th ed.), 560. (n. s.) Ch. 156; Jerdein vs. Bright, 2 John. & H. 325.

<sup>5</sup> Hotchkiss vs. Ladd, 36 Vt. 593.

<sup>2</sup> Towle vs. Topham, 37 L. T. (n. s.) 308. See also Mussell vs. Cooke, Prec. Ch. 533.

<sup>6</sup> Harris vs. Knickerbocker, 5 Wend. 644; Duffy vs. O'Donovan, 46 N. Y. 223; Haight vs. Child, 34 Barb. 186; Morrill vs. Cooper, 65 id. 512; Amburger vs. Marvin, 4 E. D. Smith, 393.

<sup>3</sup> Catling vs. King, L. R. 5 Ch. Div. 660.

<sup>4</sup> Barkworth vs. Young, 26 L. J.

<sup>7</sup> Alger vs. Johnson, 4 Hun, 412.

<sup>8</sup> Browne on Frauds (4th ed.), 565.

stock, and no tender or offer of it was made to him, whereupon plaintiff filed a bill that the 100 shares pledged might be sold and his damages paid out of the proceeds—the defendant answered, substantially admitting the making of the contract, but alleged “that the contract was void in law and not binding upon him.” It was held that the answer was not sufficient to enable him to avail himself of the Statute of Frauds or put complainant on proof of a contract in writing.<sup>1</sup>

<sup>1</sup> Vaupell vs. Woodward, 2 Sandf. Ch. 143.

## CHAPTER XI.

MEASURE OF DAMAGES.

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*I. General Rule in the United States in Actions relating to Personal Property.*

- (a.) *In Actions by Vendee against Vendor.*
- (b.) *By Vendor against Vendee.*
- (c.) *In Actions for Conversion of Personal Property.*
- (d.) *Refusal to Return Borrowed Stocks.*

*II. In Actions between Clients and Stock-brokers.*

- (a.) *By Clients against Stock-broker for Failure to Buy as per Instructions.*
- (b.) *Clients against Brokers for Failure to Sell Stocks.*
- (c.) *For Conversion of Stocks by Broker.*
- (d.) *Exceptions to Rule laid down in Baker vs. Drake.*
- (e.) *Reasonable Time.*
- (f.) *Market Value.*

*III. Measure of Damage in Actions by Stock-broker against Client.*

It is not within the limits of this work to discuss extensively the measure of damages in actions for the non-performance of contracts relative to the sale or purchase or for the conversion of personal property. This more properly belongs to a separate treatise on damages, and it has been ably performed by Mr. Sedgwick in his well-known work. The object of this book will be fulfilled by strictly confining the present chapter to the principles of the law of damages immediately



growing out of transactions in stocks and other securities dealt in by Brokers on the Stock Exchange, prefacing it with a mere statement of the general principles applicable to other kinds of personal property.

## *I. General Rule in the United States in Actions relating to Personal Property.*

### *(a.) In Actions by Vendee against Vendor.*

In an action for the breach of a contract to deliver personal property, the measure of damages seems to be the difference between the contract and the market price at the time and place where it should have been delivered.<sup>1</sup> If the price has been paid in advance, the purchaser is entitled to any rise in the value of the article which may have taken place down to the time of trial;<sup>2</sup> but the rule is modified where extraordinary circumstances have occurred to produce extreme prices in the article, or other circumstances attending the transaction which would render it inequitable to allow, as a measure of damages, the highest price of the article after default in delivery.<sup>3</sup> And it seems to be settled that the above general proposition is not altered when stocks are the subject-matter of the contract,<sup>4</sup> nor even in a case where the purchaser has paid for the property in advance.<sup>5</sup>

In an action on a guarantee that the sold shares shall yield certain annual dividends for a certain period, the meas-

<sup>1</sup> 1 Sedgwick on Damages (7th ed.), Mee. & W. 136; Pott vs. Flather, 5 552 et seq.; Randon vs. Barton, 4 Eng. Ry. & Can. Cas. 85; Tempest vs. Tex. 289. Kilner, 3 C. B. 249-253; Huntington & Broad Top R. R. Co. vs. Eng, 86 Pa.

<sup>2</sup> Id.

<sup>3</sup> Calvit vs. McFadden, 13 Tex. 324.

<sup>4</sup> 1 Sedgwick on Damages, 577; North vs. Phillips, 89 Pa. 250; Rand vs. White Mountains R. R. 40 N. H.

79; Currie vs. White, 45 N. Y. 822; 1 Sweeny, 166; Shaw vs. Holland, 15

247. But compare Kent vs. Guiter, 23 Ind. 1; Musgrave vs. Beckendorff, 53 Pa. St. 310.

<sup>5</sup> 1 Sedgwick on Damages, 578, and note (a); Orange & A. R. R. Co. vs. Fulberg, 17 Grat. 366.

ure of damages is the difference between the actual value of the shares and their value if they had proved to be of the stipulated quality.<sup>1</sup> And a party subscribing for shares at the request of another, who agrees to take them and indemnify him, is not limited to the amount paid less the market value at the time of the refusal, but may recover of the person so agreeing the amount advanced, with interest, on his refusal to fulfil the agreement.<sup>2</sup> But on a breach of contract to pay in certain State stocks to a nominal amount, it was held that the measure of damages is not the value of the State stocks at the place of delivery, as in contracts to deliver private property, but the market value of such stocks in the principal cities, deducting the necessary expense in converting the stocks into money.<sup>3</sup>

In an action between Stock-brokers upon a contract for the purchase and sale of shares of stock of a railroad corporation at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of six per cent. per annum," it was held that a sale *in presenti* was effected—the vendor becoming a quasi trustee for the purchaser; and that the latter was entitled to recover all dividends accruing thereafter on such shares, together with the difference between the contract price and interest and the market value of the shares of stock on the day when the vendor fixes the time for the delivery of the same.<sup>4</sup> And where there was a guarantee that stocks sold should be worth a certain sum, market value, within one year from date, the correct measure of damages is the difference between said sum and the highest value the stock reached in the market during the year.<sup>5</sup>

And where defendant had agreed to deliver a certificate of

<sup>1</sup> *Struthers vs. Clark*, 30 Pa. St. 210.

<sup>4</sup> *Currie vs. White*, 45 N. Y. 822.

<sup>2</sup> *Orr vs. Bigelow*, 14 N. Y. 556.

108.

<sup>5</sup> *Woodward vs. Powers*, 105 Mass.

<sup>3</sup> 1 Coldw. Tenn. 180.

ten shares of the corporate stock of a manufacturing company, whose capital was to be \$100,000, divided into not more than two hundred shares, and instead thereof made a tender of a certificate of ten shares of the stock of the company, of which \$34,000 only was paid, divided into seventy shares, the court held that the measure of damages was the value of ten shares in the full capital stock if it had been made up at the time stipulated, and the company had then been ready in good faith to operate upon the capital pursuant to its charter.<sup>1</sup> But in an action for not delivering stock according to an order which specifies no time of delivery, the measure of damages is the value of the stock when demanded.<sup>2</sup>

In Iowa, in the case of *Cannon vs. Folsom*,<sup>3</sup> it was held that where the price of the commodity contracted for has been paid prior to the time of delivery, the plaintiff may recover the highest market price between the day for delivery and the time suit is brought, provided the plaintiff does not unreasonably delay the institution of his suit.

But in England, in an action by a purchaser on a contract for the sale of railway shares, it was held that the measure of damages was the difference between the market price of the shares at the time of making the contract and the day on which it was broken; allowing the purchaser, however, a reasonable time to go into the market to buy fresh shares.<sup>4</sup>

<sup>1</sup> *Dyer vs. Rick*, 42 Mass. 180. See also *Struthers vs. Clark*, 30 Pa. St. 210. see *Hussey vs. Manufacturers & Mechanics' Bank*, 27 Mass. 415; *Sewall vs. Boston Water Power Co.* 86 id.

<sup>2</sup> *Eastern R. R. Co. vs. Benedict*, 76 Mass. 212. 277; *Wyman vs. American Powder Co.* 62 id. 168; *Baltimore City Pass. R. Co. vs. Sewall*, 35 Md.

<sup>3</sup> 2 Iowa, 101.

<sup>4</sup> *Shaw vs. Holland*, 15 Mee. & W. 136; 4 Railw. Cas. 150; 15 L. J. Ex. 87. For the measure of damages against a corporation wrongfully refusing to issue certificate of shares, 238; *Baltimore Marine Ins. Co. vs. Dalrymple*, 25 Md. 269-304; *Pinkerton vs. Manchester & L. R. Co.* 42 N. H. 424.

*(b.) By Vendor against Vendee.*

Where the goods have been delivered, the measure of damages is the contract price.<sup>1</sup> Where the goods have not been delivered, and the vendee refuses to carry out the contract, the vendor is entitled to recover the contract price.<sup>2</sup> If no price has been agreed on, the vendor is entitled to recover the market value of the subject-matter of the contract on the day when it should have been received.<sup>3</sup>

In stock cases, the value of the subject-matter of the contract is to be determined by its value in the best market for the sale of the particular or similar stock in this country, according to the ordinary course of dealing in such stocks.<sup>4</sup>

So, in England, in a suit brought for the non-acceptance of railway shares pursuant to a contract of sale entered into by two parties through the medium of Brokers, the proper measure of damages is the difference of the prices of the shares on the day when they ought to have been accepted and on the day when they were resold by the vendor, such resale being within a reasonable time.<sup>5</sup>

And in a similar case<sup>6</sup> it was held that the measure of damages was to be obtained by ascertaining the value of the shares on the day when the contract was broken, or on the earliest subsequent day when the shares could be sold. And generally the measure of damages for breach of contract to purchase or deliver stock is the difference between the contract price and the market value at the time of the breach.<sup>7</sup>

<sup>1</sup> *Terwilliger vs. Knapp*, 2 E. D. Smith (N. Y.), 86; *Thurman vs. Wilson*, 7 Brad. (Ill.) 312; 1 *Sedgwick on Damages* (7th ed.), 593.

<sup>2</sup> *Id.* 593 et seq.; *Thompson vs. Alger*, 53 Mass. 428; *Thorndike vs. Locke*, 98 id. 340.

<sup>3</sup> 1 *Sedgwick on Damages*, 592 et

seq.; *Henckley vs. Hendrickson*, 5 McLean C. Ct. 170.

<sup>4</sup> 1 *Coldw. (Tenn.)* 241; *id.* 145; 4 *id.* 433.

<sup>5</sup> *Stewart vs. Cauty*, 8 Mee. & W. 160; 2 *Railw. Cas.* 616.

<sup>6</sup> *Pott vs. Flather*, 5 *Railw. & Can. Cas.* 85.

<sup>7</sup> *Rand vs. White Mountains R. R.*

Ordinarily the vendor has three methods in which to indemnify himself:

1st. He may retain the property for the vendee, and sue him for the full purchase price.<sup>1</sup>

2d. He may sell the property, acting as agent for this purpose of the vendee, and recover the difference between the contract price and the price realized on the sale.

3d. He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price.<sup>2</sup>

But there are important elements which should be borne in mind in a case where a vendor elects to sell and charge the vendee with the difference: 1st. That such resale does not furnish the measure of damage if it does not take place within a reasonable time;<sup>3</sup> and, 2d, it seems that such a resale need not be at a public auction, it being enough to show that the property was sold for a fair price.<sup>4</sup> And the vendor is entitled to recover not merely the difference between the contract price and the price realized from the resale, but he is entitled to recover such difference, *plus* the Broker's charges and other expenses of such resale.<sup>5</sup>

*(c.) In Actions for Conversion of Personal Property.*

In actions for the conversion of personal property the general rule of the measure of damages is the full value of the chattel at the time of conversion. But if special damage has

Co. 40 N. H. 79; Currie vs. White, 45 N. Y. 822, 1 Sweeny, 166; Shaw vs. Holland, 15 Mee. & W. 136; Pott vs. Flather, 5 Eng. Ry. & Can. Cas. 85; Tempest vs. Kilner, 3 C. B. 249-253.

<sup>1</sup> But see 1 Sedgwick on Damages (7th ed.), 595, note (b).

<sup>2</sup> Dustan vs. McAndrew, 44 N. Y. 572; Hayden vs. Demets, 53 id. 426.

<sup>3</sup> Four months held not to be a reasonable time, Smith vs. Pettee, 7 Hun (N. Y.), 334.

<sup>4</sup> 1 Sedgw. on Damages (7th ed.) 594, 595; White vs. Kearney, 2 La. Ann. 639; Crooks vs. Moore, 1 Sandf. (N. Y.) 597.

<sup>5</sup> Whitney vs. Boardman, 18 Mass. 242; 1 Sedgw. on Damages (7th ed.) 593, note b.

been sustained, it is recoverable.<sup>1</sup> The rule formerly was, in the United States, that in such an action, where the value of the property converted was of a fluctuating character, the measure of damages is the highest price of the article between the time of the conversion and the trial.<sup>2</sup>

The main reason, if there be any reason for it, which seems to have been assigned for distinguishing the measure of damages where the subject of the suit was of a fluctuating nature, and where its value was uniform and ascertained, is, that in the former case the owner is deprived of the use of his property to the time of the trial;<sup>3</sup> and if his goods had not been detained the plaintiff might have had a good opportunity of selling the same.<sup>4</sup>

*(d.) Refusal to Return Borrowed Stocks.*

In this connection should also be considered those cases where a borrower, pledgee, or other person refuses to return stock. This refusal generally constitutes a conversion, and the measure of damages would ordinarily be the same as in that class of actions—viz., the value at the time of conversion,

<sup>1</sup> Wood vs. Morewood, 3 Q. B. 440, n.; Finch vs. Blount, 7 Car. & P. 478; Ewbank vs. Nutting, 7 C. B. 809. It has been held that the measure of the liability of the pledgee to the pledgor upon a conversion of the pledge is its value at the time of the conversion. Robinson vs. Hurley, 11 Iowa, 410. Under § 3336 of the Civil Code of California, as amended Jan. 22, 1878, the damages which a pledgor is entitled to from a pledgee who has converted pledged stock is the highest market value of the stock at any time between the conversion and the verdict (Dent vs. Holbrook, 54 Cal. 145).

<sup>2</sup> 2 Sedgw. on Damages (7th ed.), 378. But in Matthews vs. Coe, 49 N. Y. 57, the court said: "An un-

qualified rule giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, I am persuaded, cannot be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time, and prosecuted with reasonable diligence, relieve it of its objectionable character."

<sup>3</sup> 2 Sedgw. on Damages (7th ed.), 375.

<sup>4</sup> Greening vs. Wilkinson, 1 Car. & P. 625. For rule in the different States as to measure of damages in actions for conversion of property, see Sedgw. on Damages (7th ed.), where the cases are collected.

together with all dividends, interest, or accretions which may have accrued on the stock.<sup>1</sup> The measure of damages for not returning borrowed stocks at the time agreed is the market price at the time when they should have been returned,<sup>2</sup> or the highest price intermediate that time and the suit.<sup>3</sup> In one case the pledgee of stock wrongfully sold it; and when the pledgor offered to pay the debt and requested a return, he was put off from time to time by the pledgee with promises to replace it, and in the meantime it rose in value. Held, in an action for wrongfully selling the stock, that the pledgor might recover the enhanced value.<sup>4</sup> The measure of damage for breach of a contract to return borrowed bank stock on demand is the value of the stock on the day of the demand, with interest for the delay. An increase in value cannot be taken into account.<sup>5</sup> But there may be cases where a plaintiff has been "deprived of some special use of the property anticipated by the wrongdoer;" in which event, and in some other special instances, a different rule of damages may prevail.<sup>6</sup> In Pennsylvania the measure of damages for the breach of contract to replace borrowed stock is its highest price between the breach and the trial.<sup>7</sup> But this rule only applies where, by the refusal to perform, the plaintiff has suffered the loss of the advanced price of the stock.<sup>8</sup>

There have also been several English decisions in actions growing out of failures to return borrowed stocks which should be noticed. It has been held that the true measure of damages in an action for not redelivering shares lent to the

<sup>1</sup> 2 Sedgw. on Damages (7th ed.), at time of demand, with interest, was allowed.  
391.

<sup>2</sup> Day vs. Perkins, 2 Sandf. Ch. 359; 2 Sedgw. on Damages (7th ed.), 141.

<sup>3</sup> McKenny vs. Haines, 63 Me. 74.

<sup>4</sup> 2 Sedgw. on Damages (7th ed.), 391.

<sup>5</sup> Id. 365, note.

<sup>6</sup> Wilson vs. Little, 2 N. Y. 443, aff'g 1 Sandf. 351; compare Roberts vs. Berdell, 61 Barb. 37, where the value

<sup>7</sup> Musgrave vs. Beckendorf, 53 Pa. St. 310; Richardson vs. Sewing-machine Co. 17 Pitts. L. J. 1.

<sup>8</sup> Phillips's Appeal, 68 Pa. St. 130.

defendant upon a contract to return them on a given day is not the market price at the time of the breach, but the market price at the time of the trial.<sup>1</sup>

So in *Forrest vs. Elwes*,<sup>2</sup> where there was a transfer of stock by way of loan upon bond, with condition to replace the stock six months after the date, and in the meantime to pay interest at five per cent. The stock not being replaced, and having depreciated, the obligee was held to be entitled to the value of the stock at the time of the transfer, with interest at five per cent. to the date of the report, credit being given for some payments on account of the principal.

In *McArthur vs. Seaforth*<sup>3</sup> the plaintiff gave a bond conditioned to replace five per cent. stock on a given day. After that day the government gave the holders of that stock an option to be paid off at par or to commute their stock for three per cents. The plaintiff expressed to the defendant a wish to have the stock replaced, that he might be paid at par, but no wish to take three per cent. stock; but it was held, that he was not entitled to recover the price of so much three per cent. stock as he might have obtained in exchange for the five per cents.<sup>4</sup>

And in an action for the detention of scrip shares, where it appeared, after action brought and before verdict, the scrip had been delivered up, it was held that the jury might, as a measure of damages, take into consideration the difference in value of the scrip shares between the time of the demand and refusal and the time of the delivery of them.<sup>5</sup>

<sup>1</sup> *Owen vs. Routh et al.* 14 C. B. 327. To same effect, *Shepherd vs. Johnson*, 2 East, 211.

<sup>2</sup> 4 Ves. Jr. 492.

<sup>3</sup> 2 Taunt. 257.

<sup>4</sup> As to measure of damages in actions for non-delivery of railway shares pursuant to contract, as dis-

tinguished from actions for not replacing borrowed stock, see *Barned vs. Hamilton*, 2 Railw. Cas. 624; *Shaw vs. Holland*, 15 Mee. & W. 136; *Tempest vs. Kilner*, 2 C. B. 300; 3 id. 249.

<sup>5</sup> *Williams vs. Archer*, 2 Railw. Cas. 289; 5 C. B. 318; 17 L. J. C. P. 82.



## *II. In Actions between Clients and Stock-brokers.*

### *(a.) By Clients against Stock-brokers for failure to Buy as per Instructions.*

The true rule upon this subject is clearly stated by Story<sup>1</sup> as follows: "From what has been already said, it is sufficiently clear that wherever an agent violates his duties or obligations to his principal, whether it be by exceeding his authority, or by positive misconduct, or by mere negligence or omission in the proper functions of his agency, or in any other manner, and any loss or damage falls on his principal, he is responsible therefor, and bound to make a full indemnity."<sup>2</sup>

In the outset it is safe to lay down this general proposition, drawn from the analogous relation of principal and agent<sup>3</sup>—that a Client, in an action against his Broker for not obeying instructions, can recover only the actual loss he has sustained.<sup>4</sup> And, accordingly, if the Client suffer no loss by the failure of his Broker to obey instructions in reference to purchasing or selling stocks, upon general principles it is *injuria sine damno*: the former can recover nothing beyond nominal damages for the mere breach of duty on the part of the Broker.<sup>5</sup>

In the case of *White vs. Smith*,<sup>6</sup> the question directly arose as to the proper measure of damages in an action by a Client against a Stock-broker for the failure of the latter to buy stocks as per order, the object of the purchase being to cover a "short" sale; and it was held, after a full citation of general authorities by counsel, that the plaintiff was entitled to recover

<sup>1</sup> Agency (8th ed.), 2170.

<sup>2</sup> See this principle as applied to Stock-brokers in *Fowler vs. N. Y. Gold Exchange Bank*, 67 N. Y. 138, 143.

<sup>3</sup> 2 Sedgw. on Damages (7th ed.), 53.

<sup>4</sup> *Cameron vs. Durkheim*, 55 N. Y. 425; *Fowler vs. N. Y. Gold Exchange*

*Bank*, 67 N. Y. 138, 143; *Hope vs. Lawrence*, 50 Barb. (N. Y.) 258; *White vs. Smith*, 54 N. Y. 522; and consult particularly cases cited in Ch. III. p. 123 et seq.

<sup>5</sup> 1 Sedgw. on Damages (7th ed.), 40, 580.

<sup>6</sup> 54 N. Y. 522.

the *profits* which he necessarily would have made if his order had been executed—viz., the difference between the price at which the stock was sold short and the market price upon the day when the order was received by the Broker to “buy in” or purchase, with interest after deducting commissions. In that case the Stock-broker sold for plaintiff’s account 300 shares of stock “short” at 186, and subsequently, without the plaintiff’s order or knowledge, and when his margin was unimpaired, “closed” the transaction by “buying in,” or purchasing, the stock. The plaintiff, a few days subsequently, ordered the stock to be purchased to close the transaction, which was disregarded. Mr. Commissioner Earl, who delivered the opinion of the court, said: “If the defendants had not disabled themselves from obeying the order, and had obeyed it, the plaintiff would have made the precise sum which the jury awarded him. The loss of this profit was the direct and proximate consequence of the defendant’s breach of duty to the plaintiff, and I know of no rule of law that was violated by the measure of damages adopted.”

But a Client cannot recover from his Broker the market price of gold on the day that he demands it to be bought in to cover a short sale, where it appears that he failed to put up margin after demand, and in consequence of which the Broker made a settlement with the lender, which was the customary method of closing such transactions.<sup>1</sup> Nor can principals recover from their agents, doing business as a clearing-house to make exchanges between Gold-brokers, where they neglect to execute properly the principals’ business, any sum greater than the actual loss suffered by the latter, or any more than the principals would have made by performing the contract in person.<sup>2</sup>

This last-mentioned case grew out of what was known as

<sup>1</sup> *Cameron vs. Durkheim*, 55 N. Y. 425.

<sup>2</sup> *Fowler vs. N. Y. Gold Exchange Bank*, 67 N. Y. 138.

the "Black Friday" excitement. It appeared that plaintiffs contracted to sell \$50,000 of gold at 141½ currency, to be delivered September 24, 1869; defendant was the common agent for dealers in gold, employed in the settlement of their contracts. Plaintiffs did not furnish the gold and fulfil their contract, but defendant furnished and delivered it, receiving the currency agreed to be paid therefor. Plaintiffs thereafter tendered to defendant the amount of gold so delivered, and demanded the currency received, which the latter refused to pay. In an action to recover the same, held, that while defendant was not bound to perform the contract on behalf of plaintiffs, as they did not furnish the gold, yet, having done so, it was estopped from denying plaintiff's right to the benefit of the contract; that plaintiffs, by asserting their claim to the moneys received, adopted and ratified the acts of defendant, and the rights and obligation of the parties were to be determined by the rules governing the relation of principal and agent; that while defendant could not make a profit to itself, yet, having acted in good faith, it could not be compelled to suffer a loss; that the gold furnished would not be treated as a loan, but defendant was entitled to retain as an indemnity for furnishing it so much of the currency received as the gold was actually worth at the time, and plaintiffs were only entitled to the surplus.

As we have fully set forth in the third chapter the cases in which Clients have recovered against their Brokers for violation of instructions, it is only necessary to refer to them in this connection.<sup>1</sup>

*(b.) Client against Broker for Failure to Sell Stocks.*

The rule would seem to be the same where the Client directs his Broker to sell stocks, for if the former is the actual

<sup>1</sup> Ch. III. p. 123 et seq.

owner of the stocks, or is "long" of them, he suffers an actual and easily ascertainable loss by the failure of the Broker to make the sale at the price and time at which he is directed.<sup>1</sup>

If the Broker cannot make the sale at the time and place directed, the very nice but unfortunately undetermined question arises, whether he will be justified in selling at the next lowest or at the market price, as the case may be. This will, in a measure, depend upon the course of dealing between the parties, or perhaps, in some cases, it is to be determined by the usage of Stock-brokers. The general principle of the law is, however, that an agent who is instructed to sell at a specific price is not justified in selling at a different price, or upon terms other than those prescribed in his instructions. He is held rigidly to a compliance with the orders he has received.<sup>2</sup>

Where, however, a principal gives his Broker orders to sell gold for him if it reach a certain price, and that price is reached and the Broker does not sell, but holds on, hoping in good faith to realize a still higher price for his principal, but, owing to a sudden fall, a sale at a lower price is finally made, the Broker is liable only for the actual loss sustained. He cannot be charged with any loss from a neglect to sell at the highest point reached.<sup>3</sup>

Another interesting and also undecided question arises in cases where the Client orders the Broker to sell stock which he does not possess—viz., for the purposes of a "short" sale. In this event, what will be the measure of damages? If the Broker make the sale at a lower price than he was directed, the damage, it is reasonably clear, would be the difference between that price and the price at which he was ordered to

<sup>1</sup> White vs. Smith, 54 N. Y. 522.

<sup>3</sup> Hope vs. Lawrence, 50 Barb.

<sup>2</sup> See these questions discussed in (N. Y.) 258.  
Ch. III. p. 118 et seq.

sell, or could have made the sale, for this is a direct loss to his Client. But the difficulty will arise in cases where the Broker wholly neglects or disregards the order, and makes no sale at all. What is the measure of damages in such a case? To answer this question two propositions must be solved—*i. e.*, first, the price at which the Broker should be held for a neglect or refusal to sell for the short account. This is readily answered by charging him with the stocks at the price at which he was ordered to sell. But as a “short” sale involves two operations—*viz.*, a selling and a buying-in, or “covering,” of the stocks—a second and more difficult question arises—*viz.*, as to the time and price at which the Broker should be charged for the stock which is necessary to be bought in to complete the transaction. In other words, the whole question rests upon uncertainty, and must be left to the peculiar circumstances of each case.<sup>1</sup>

A fair rule might be established by confining the measure of damage to the difference between the price at which the Broker could have sold the stock short and at which it could have been bought in within a *reasonable time* thereafter, or a reasonable time after the Client had received notice that the stocks had not been sold short according to direction. The adoption of such a rule would tend to prevent the operation of a speculative result, which was so emphatically condemned in the well-known case of *Baker vs. Drake*.<sup>2</sup>

(c.) *Measure of Damages for Conversion of Securities by Broker.*

Formerly, in an action against a Stock-broker for the conversion of stocks, the same rule of damages was applied which existed in actions for the conversion of ordinary personal

<sup>1</sup> See for definition of “short sale”      <sup>2</sup> 53 N. Y. 211.  
Ch. III. p. 180.

property—viz., the highest price of the same between the date of the conversion and the time of the trial. Thus, in New York, this rule was applied in an action by a Client against his Stock-broker in the well-known case of *Markham vs. Jaudon*.<sup>1</sup> This rule was attacked by Mr. Sedgwick in his learned treatise on the law of damages,<sup>2</sup> when applied to actions for the non-performance of contracts to deliver merchandise or stocks, as being purely conjectural, and based on the highly improbable assumption that the plaintiff would have retained the property, if the contract had been complied with, till the period of its highest value, and have thus realized the latter price.

But, despite its glaring injustice, the rule remained in full force in the State of New York until the year 1873, when it was overturned by the widely known case of *Baker vs. Drake*,<sup>3</sup> after an elaborate and close examination of the subject and cases by Mr. Justice Rapallo.

The theory of the old rule was, that when a Broker had sold the stock of his Client without notice, and thus committed a conversion, the latter might, within a reasonable time after notice of the act, begin suit; and that he was entitled to avail himself of the extremest fluctuations of the stock market, and select the date, at any time between the time of the conversion and the end of the trial, at which the converted stock had reached its highest point, and that the law would fix the latter as the measure of damages to which he was entitled.

The consequence of applying such a rule to the transactions of Wall Street was most alarming and unjust; and it seemed

<sup>1</sup> 41 N. Y. 435; *Lawrence vs. Maxwell*, 6 Lans. (N. Y.) 469; *Nauman vs. Caldwell*, 2 Sweeny (N. Y.), 212; *Romaine vs. Allen*, 26 N. Y. 309. in an action for the conversion of grain.

<sup>2</sup> 1 Sedgw. on Damages (7th ed.), 578, and note (a).

<sup>3</sup> 53 N. Y. 211; also 66 id. 518. Burt vs. Dutcher, 34 N. Y. 493, reaffirms the rule laid down in *Romaine vs. Allen*.

only necessary to present the question in its full aspect and extent to an intelligent court to have it reversed; and Mr. Justice Rapallo, in the case just alluded to, has most ably shown that such a rule had no just foundation in the law of damages. He declared that it was immaterial in what form of action this question arose, as the answer would inevitably be the same. "The rule of damage should not depend upon the form of the action. In civil actions the law awards to the party injured a just indemnity for the wrong which has been done him, and no more, whether the action be in contract or tort, except in those special cases where punitive damages are allowed." In the case of *Baker vs. Drake* it appeared that the plaintiff had bought stocks on speculation through the defendants, who acted as his Brokers, to an extent of over \$66,000, and had advanced as margin the sum of \$4240; and at the time of the conversion by the illegal sale there was, at the market price of the stocks on that day, a surplus of only \$558 due the plaintiff. At the time the plaintiff began his action against the defendants—viz., on November 24, 1868—the shares would have brought some \$5500 more than the sum for which they had been sold; but after the commencement of the action, and before the trial, the stock underwent alternate elevation and depression, and reached its maximum point in August, 1869. It afterwards, and before the trial, declined. The jury, in obedience to the rule laid down by the court, found a verdict for the plaintiff, basing it upon the highest price of the stock before the trial; so that more than two thirds of the supposed damage arose after the bringing of the suit. Mr. Justice Rapallo reasoned that this enormous profit could only have been arrived at upon the unfounded supposition that plaintiff would not only have carried the stock through all its fluctuations until it reached its highest point, but that he would have fortunately seized upon

the precise moment to sell, and escaped the subsequent decline by a sort of "supernatural power of prescience."

The learned judge distinguished the case from one where the stock *had been purchased as an investment*, and held that if, when the plaintiff was informed of the sale of his stock, and conversion, he desired further to prosecute the adventure, it was his duty to require the defendants to replace the stock; and, if they refused to do so, his remedy was to do it himself, and charge them the loss reasonably sustained in doing so. "*The advance in the market price of the stock from the sale up to a reasonable time to replace it, after the plaintiff received notice of the sale, would afford a complete indemnity.*" The learned justice, after a full review of the cases, held that the latter statement contained the true measure of damages, and reversed the judgment.

Upon a retrial of this case, the jury were charged that the plaintiffs were "entitled to recover as damages what it would have cost to replace the stock—that is, the price of the stock, on a day within a reasonable time after the wrongful sale" (*i. e.*, conversion); and a recovery based upon the market value of the stock on a day between the sale and the commencement of the action was held correct.<sup>1</sup> In *Brass vs. Worth*<sup>2</sup> it was held, in an action for conversion of stocks, that as to a portion thereof its *value on the day when the plaintiff* demanded a return of it was the proper measure of damages; and as to stock which had not been demanded, that the rule was the difference between its market value on a certain day which was a reasonable time and the cost price of the defendant's purchase thereof, with interest. This case was mentioned with approval by Rapallo, J., in *Baker vs. Drake*. The doctrine there so strongly laid down has been frequently confirmed since the decisions above referred to.

<sup>1</sup> *Baker vs. Drake*, 66 N. Y. 518.

<sup>2</sup> 40 Barb. (N. Y.) 648.



The rule of *Baker vs. Drake* was again applied in the recent case of *Gruman vs. Smith*,<sup>1</sup> where the court held that, although a Broker would be guilty of a technical conversion in selling a Client's stocks without notice, the latter could only insist upon a full indemnity for his loss or injury; and that such indemnity consisted of any advance in price within a reasonable time after notice of the illegal sale.<sup>2</sup>

In the case of *Colt vs. Owens*,<sup>3</sup> it appeared that defendants, who were Stock-brokers, in consideration of the guarantee of a third person against loss, agreed with plaintiff to buy and hold for him, subject to his order, two hundred shares of Michigan Central stock. The shares were bought at 71, and held until the guarantor notified defendants that he withdrew his guarantee. Defendants notified plaintiff of the withdrawal, and that they would sell the shares unless he put up margin. Plaintiff denied defendants' right to assent to the withdrawal of the guarantee, and claimed that they should continue to hold the shares until he should direct their sale. Defendants thereupon sold the stock under circumstances that were admitted on the trial to have been unauthorized. The testimony showed that defendants sold the stock on November 15, 1878, at 69½, and gave plaintiff notice thereof; and that for thirty days thereafter it could have been bought in the market for that price or less. In January, 1879, plaintiff gave an order that the stock be sold. Its market value was then 80, and plaintiff claimed that he was entitled to recover the difference between the purchase price and the value in January. The court held that he was entitled to the difference between the purchase price and the price he would then have been obliged to pay in the market within a reasonable time after the un-

<sup>1</sup> 81 N. Y. 25.

May 4, 1880, where the rule is again

<sup>2</sup> See also *Burridge vs. Anthony*, happily applied by McAdam, J.  
N. Y. Marine Court, N. Y. *Daily Reg.*

<sup>3</sup> See 13 N. Y. Week. Dig. 40.

authorized sale, and directed a verdict for nominal damages. The General Term held this no error:<sup>1</sup> that the thirty days within which the plaintiff might have regained the stock in the market without loss was the reasonable time within which he should have acted; that the fact that the defendants had security in the shape of a guarantee did not distinguish the case from *Baker vs. Drake*; that there was nothing to show that the withdrawal of the guarantee or the arrangement between plaintiff and the guarantor had taken any part of plaintiff's means of buying the stock on his own account. After the withdrawal, he had the same facilities for buying that he possessed before it was given. It was proven that he had nothing for the guarantee, and was liable to pay nothing.<sup>2</sup>

In Pennsylvania, it was held that where a party is liable to account for stock as trustee he is chargeable with the highest market value on his refusal to account.<sup>3</sup>

It has also been laid down in the same State that where bank stock had been wrongfully withheld from a party entitled to it, the measure of damages, if the consideration of the stock had been paid, is the highest market value between the breach and the trial, together with the bonus and dividends which have been received in the meantime; but if the consideration had not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock.<sup>4</sup>

<sup>1</sup> 13 N. Y. Week. Dig. 40.

<sup>2</sup> See also, in this connection, *Waddell vs. Blockley*, 27 Week. Reporter, 931; *White vs. Smith*, 54 N. Y. 522, aff'g 6 Lans. 464; *Fowler vs. Gold Exchange Bank*, 67 N. Y. 138. But Brokers may settle at a certain price which will be adopted as a proper measure of damages, *id.* See also *Cameron vs. Durkheim*, 55 N. Y. 425. And in an action for the value of

stock converted by the defendant, where the plaintiff waives the tort and sues in assumpsit, the measure of damages is the value of the stock at the time of the conversion (*Wagner vs. Peterson*, 34 Leg. Int. 48; 83 Pa. St. 238).

<sup>3</sup> *Reitenbaugh vs. Ludwick*, 31 Pa. St. 131.

<sup>4</sup> *Bank of Montgomery vs. Reeve*, 26 Pa. St. 143.

In a subsequent case, the same court, upon the authority of the preceding case, laid down the rule as follows: "The stocks were still a mere pledge; then dividends and accretions belonged to the pledgor. After the unauthorized sale of them to third persons, they are also in equity chargeable with what would have been received had they retained them, as they ought to have done, until the equity of redemption in the complaint was foreclosed by a sale after notice in the manner prescribed by law. It follows that they must account to the plaintiff and appellant for the value of the stock at the highest rate which it has at any time since attained in the market."<sup>1</sup>

The rule of damages, however, as stated in the last-mentioned case, does not apply to ordinary stock contracts, but only to trusts and cases where justice could not be reached by the usual measure of damages.<sup>2</sup>

In this case of *North vs. Phillips*,<sup>3</sup> which was an action in assumpsit, although it should have more properly been an action for conversion, the court, through Mr. Justice Gordon, in discussing the question of the measure of damages, said: "Where parties, as in the present case, stand in *equali jure*, there cannot be two different rules of compensation for the breach of an agreement—one for the buyer and another for the seller. Were North & Co. suing on a breach of the alleged contract by Phillips, their damages would be measured by the market price of the stock on the day fixed for its delivery compared with the contract price. If we reverse the parties, the same rule applies. If North & Co. refused to execute the contract, then Phillips was entitled to the difference in the prices as above stated, but nothing more, unless fraud was practised upon him, and then his damages might be exemplary. In fine, the rule governing damages in contracts

<sup>1</sup> *North vs. Phillips*, 89 Pa. St. 250.

<sup>2</sup> *Id.*

<sup>3</sup> 89 Pa. St. 250.

for stocks is the same as that in contracts for any other marketable commodity."

In California, in the case of *Douglass vs. Caft*,<sup>1</sup> the "highest value" rule was adopted; but in *Hamer vs. Hathaway*<sup>2</sup> it was admitted that "some qualification of the rule may be found necessary where there has been an unreasonable delay in bringing suit, or under certain special circumstances." And in the later case of *Page vs. Fowler*<sup>3</sup> the fluctuating rule was pronounced as "of American origin," and that if unqualified it would be unjust. The court finally held that the correct measure of damages in the class of cases in which it has been applied is the highest market value within what, under the circumstances of each case, is a reasonable time after the property is taken, with interest from the time when the value was estimated.

But in the case of *Dent vs. Holbrook*<sup>4</sup> it was held that an unauthorized sale by a Stock-broker of certificates of shares of stock in a mining corporation, on which the Broker has a lien for payment of part of the purchase-money, is a conversion, for which the owner of the certificates is entitled to recover as damages the highest market value of the stock at any time between the conversion and the verdict, without interest.<sup>5</sup>

The reasons for rejecting the old rule in actions against Brokers for conversion of stock are very strong, and have been so ably summarized by Mr. Justice Rapallo that it is unnecessary to repeat them.

The theory upon which damages are awarded is to furnish an indemnity to the party wronged. Where a rule goes be-

<sup>1</sup> 9 Cal. 562.

<sup>2</sup> 33 Cal. 117.

<sup>3</sup> 39 Cal. 412.

<sup>4</sup> 54 Cal. 145.

<sup>5</sup> Cal. Cod. Civ. Proc. § 3336, as amended Jan. 22, 1878. See also

*Tully vs. Tranor*, 53 Cal. 274, where it appears that the measure of damages is the value of the property at the time of conversion, with interest from that time.

yond it and entitles the party injured to speculate in an action, it should not be adopted.

But the reasons assigned for sustaining the old rule '—that equity would decree a specific execution of a contract for replacing stock, and that, when such a decree is made to enable the defendant to perform it, he must of necessity purchase the stock at its then market price, and therefore he can have no right to complain when he is compelled to pay the same sum as damages by the judgment of a court of law; and, secondly, that as stock is usually held not for sale, but as a permanent investment, it is a reasonable presumption that plaintiff would have retained its possession until the day of trial, and hence its price at that time is no more than an indemnity—are no longer tenable.

In respect to the first of these grounds, it is now settled that, as a general rule, a court of equity will not decree the specific execution of a contract for the sale of stock.<sup>2</sup> Stock generally has no ear-mark; one share is of equal value with every other share of the same stock, and the plaintiff can obtain full redress in a court of law. As to the second ground, it is now a question of evidence whether the stocks are held speculatively or for investment, and one not determinable by any presumption. If the stock is shown to be held for investment, perhaps, as will be seen hereafter, a different rule will apply from that laid down in *Baker vs. Drake*.<sup>3</sup>

(d.) *Exceptions to Rule Laid Down in Baker vs. Drake.*

1. *Where Stocks are Held for Investment.*

The ruling in the case of *Baker vs. Drake*<sup>4</sup> was in express terms confined to those cases where the Client had purchased

<sup>1</sup> *Suydam vs. Jenkins*, 3 Sandf. on Damages (7th ed.), 379, note (b), 614. and cases cited. <sup>2</sup> *Supra*.

<sup>3</sup> *Ante*, p. 717 et seq.; 2 Sedgwick <sup>4</sup> 53 N. Y. 211; 66 N. Y. 518.

stocks for "speculative" purposes. And it was very strongly intimated that the old rule, allowing a recovery against one who converted personal property of the highest market price between the conversion and the time of the trial, would be applicable to a case where it appeared that the principal had advanced the money to pay for the stock, and had bought and held the same for purposes of investment. This distinction had also been previously recognized in the dissenting opinions in the case of *Markham vs. Jaudon*.<sup>1</sup> It is true that in cases of stocks held for investment there is a great probability that the owner would have continued to hold them if they had not been converted; but still, in awarding him the highest price of the property between the time of its conversion and the trial, speculation and uncertainty to a considerable degree enter into the result. Yet all the presumptions should be against the wrong-doer, and there seems to be no unreasonable hardship in the supposed case in awarding against such wrong-doer the highest possible damages, where he has knowingly and deliberately dealt with property belonging wholly to his Client, upon which he had not even a lien except to the extent of his commissions. But this question, when it arises, will be mainly governed by the circumstances disclosed. As to the method of determining the question whether stocks are held for investment, it seems, as we have before intimated, to be a question of fact which should be proved like any other important issue.<sup>2</sup>

## 2. *Where the Broker Realizes a Profit from his Wrong-doing.*

Another distinction which is shadowed in the cases, and which may form an exception to the rule of *Baker vs. Drake*,

<sup>1</sup> 41 N. Y. 247, 257.

<sup>2</sup> *Suydam vs. Jenkins*, 3 Sandf. (N. Y.) 614. For the proper measure of damages in the case of a Broker who hypothecates the securities or stocks

of his Client, and is unable to return them by reason of his insolvency, see *Chamberlain vs. Greenleaf*, 4 Ab. New Cas. (N. Y.) 92, 178.

is that even where stocks are held speculatively, and it can be shown that they have been converted or illegally disposed of by the Broker, and by such act, or from the stocks in question, the Broker has derived a profit or advantage, the rule would seem to be that the principal may recover the same either in addition to or as the regular measure of damages, as the case may be.<sup>1</sup> The Client has the option, where an illegal disposition has been made of his stocks, either to treat the sale as a conversion and recover damages, or he can affirm the sale and recover the profits realized therefrom.<sup>2</sup> Or in certain cases—as, for instance, where the Broker has himself become the purchaser of the securities—he can claim that the sale is void, and that his securities are undisposed of to the same extent as if no sale had been made at all.<sup>3</sup> The rule of law is invariable that an agent can never derive any benefit from his position, and that all advantages and profits belong to the principal.<sup>4</sup>

(e.) *Reasonable Time.*

If the doctrine laid down by the New York Court of Appeals in the case of *Baker vs. Drake* is sound, and there seems to be no good reason for questioning the decision, it becomes essential to know what time the law would regard as “reasonable,” and within which it would compel a principal to go into the market and purchase his stocks after he has been notified that his Broker has made a conversion or illegal disposition of them. Upon a second trial of that case the court left the question of “reasonable time” to the jury, charging, in substance, that if the right of action was established, the plaintiff was entitled to recover as damages what it would have cost him to replace the stocks on a day within

<sup>1</sup> *Taussig vs. Hart*, 49 N. Y. 301; Same vs. Same, 58 id. 425.

<sup>2</sup> *Id.*

<sup>3</sup> See authorities for this proposition, Ch. III. p. 224.

<sup>4</sup> *Fowler vs. N. Y. Gold Exchange Bank*, 67 N. Y. 138.

a reasonable time after the sale, *i. e.*, the conversion;<sup>1</sup> and it is manifest that this is the safest disposition of the question. As a general rule, the question of what constitutes a "reasonable time" is left with the jury; but it would seem that a Client is not obliged to buy on the same day that he receives notice of the conversion.<sup>2</sup> In the case of stock transactions, an extraordinary condition of the market, or the time, place, circumstances, or situation of the parties, renders any precise definition of the phrase "reasonable time" impracticable and unsafe; and the question should properly be submitted to the jury, with such explanation or qualification as the circumstances of the case demand.

The question as to what constituted a "reasonable time" within the rule laid down in *Baker vs. Drake* directly arose in the case of *Burridge vs. Anthony et al.*<sup>3</sup> In that case there was a sale of the Client's securities without authority. He did not, after notice of the sale, promptly disaffirm the same, nor require the Brokers to replace the stocks, and did not buy back or replace the stocks himself. Down to and including ten days after the Client had notice of the sale, he could have repurchased at a price less than they were sold for by the Brokers. The court held that ten days, under the circumstances, was a reasonable time, and that, as the Client had suffered no real loss by the acts of which he complained, he was not entitled to any recovery.

### (f.) *Market Value.*

It is of very great importance, in suits in which the price of stocks and other securities is to be determined, to know defi-

<sup>1</sup> *Baker vs. Drake*, 66 N. Y. 518.

*Mee. & W.* 160; *Field vs. Lelean*, 6 H.

<sup>2</sup> *Stevens vs. Hurlbut Bank*, 31

& N. 617.

Conn. 146. When evidence of what is a "reasonable time" may be given relative to transactions on the Stock Exchange, see *Stewart vs. Cauty*, 8

<sup>3</sup> *N. Y. Daily Reg.* May 4, 1880; *N. Y. Marine Ct.* April 30, 1880. See also cases cited in next paragraph (f.).



nately what the exact meaning is of the phrase "market value." Stocks fluctuate so widely in a day that it may be of the gravest concern to litigating parties to fix the price at a certain hour, or even minute. The few cases that in any wise bear upon this topic leave it in a condition of great indefiniteness and uncertainty; but the true rule would seem to be to leave the question to the determination of a jury. It is certainly competent for the plaintiff to prove the range of prices during a particular day, and it would consequently follow that the jury may arrive at its conclusion by averaging or taking the lowest or highest price of the stock during the day.<sup>1</sup>

In the case of *Fowler vs. N. Y. Gold Exchange Bank*,<sup>2</sup> the measure of damage in an action by principals against their agent for profits made by the latter in carrying out a contract by which plaintiffs had agreed to sell a certain amount of gold coin to a third person, it was held that the plaintiffs were entitled to recover all that they would have made by performing the contract in person and with their own gold—viz., by "taking the price of the gold as it appears by the record to have been at the *hour* of the performance of this contract."

In that case the evidence showed that the day on which the contract was to be performed was one of uncommon excitement among gold-dealers, and very great and rapid fluctuations in prices were made.

The case of *Cameron vs. Durkheim*<sup>3</sup> also illustrates the present question of fixing the loss or measure of damage at a certain hour of the day. That was an action against Gold-brokers for a breach of duty where it appeared that defendants sold a large quantity of gold "short" for plaintiff, and, in accordance with the custom, borrowed gold to deliver; and

<sup>1</sup> See 1 Sedgwick on Damages (7th ed.), 585, and cases cited.

<sup>2</sup> 67 N. Y. 138.

<sup>3</sup> 55 N. Y. 422.

an extraordinary rise taking place in gold, defendants called upon plaintiff to furnish immediately additional margin, who, according to the evidence of the former, said that he was ruined and defendants must take care of themselves. It was decided that evidence was competent on the part of defendants to show that, in a case where a Client refused to advance sufficient margin, the custom of Brokers authorized the defendant to make a settlement with the lender of the gold at the then market price; and that the language of the plaintiff above referred to was sufficient to authorize defendants to settle in accordance with such custom, if the jury should find that it was made in good faith and was a discreet and judicious exercise of the power conferred. The market value may be proved by prices current contained in a file of newspapers published at the time of the prices referred to, for public information.<sup>1</sup>

Before closing this branch of the chapter, it should be stated that where a Broker or pledgee is sued for converting stocks or pledges, he may recoup the amount of any debt due to him from the principal or pledgor.<sup>2</sup>

### *III. In Actions by Stock-broker against his Client.*

The general rule of law is that there is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders.<sup>3</sup> "It is well settled that if an agent, without default, incurs losses or damages in the course of transacting the business of his agency, or in following the

<sup>1</sup> *Clicquot's Claim*, 3 Wall. 117; 392, 393; *Gruman vs. Smith*, 81 N. Y. Terry vs. McNiel, 58 Barb. 241; but 25, rev'g 41 N. Y. Superior Ct. 389. see *Whelan vs. Lynch*, 60 N. Y. 469; Also ante, p. 200.

65 Barb. 326. Court of Appeals, *Harris vs. Ely*, Seld. Notes, No. 1, 35; Lindley on Partnerships (4th ed.), s. c. 1 Liv. Law. Mag. 145. 731; *Howe vs. Buffalo, N. Y., & Erie*

<sup>2</sup> 2 Sedgw. on Damages (7th ed.), R. R. Co., 37 N. Y. 297.

instructions of his principal, he will be entitled to full compensation therefor.”<sup>1</sup>

In analogy to this rule, it has been frequently held that a principal, by employing a Stock-broker to buy or sell stocks, etc., becomes bound to indemnify him against any losses which he may incur by reason of his having contracted in his own behalf, and of being afterwards, without any default of his own, unable duly to complete his contract.

We have already, in the third chapter, fully set forth these cases in such a way as to render their statement in this connection supererogatory, and an examination of them will fully bear out the general proposition here laid down as to the right of the Stock-broker to full indemnity.<sup>2</sup> The following American case, not heretofore cited, fully illustrates the extent to which the rule is carried. In that case the plaintiffs, who were Brokers, having been ordered to buy stock, did so, paid for it, taking the certificate in their own name, offered to transfer it, and demanded of their principal payment, which he did not make, and the stock declined in value. The court held that they could recover the price paid by them, and not merely the difference between that price and the market value on the day of their demand.<sup>3</sup>

And the cases above referred to establish as a general doctrine that whatever a Broker, employed in buying and selling shares for another person, is compelled by the rules of the Stock Exchange to pay, in consequence of the non-performance by his employer of the contract entered into on his behalf, is recoverable from him by the Broker. The principle of the decisions in question does not, however, extend further than this—viz., that Brokers are impliedly authorized by those who employ them to do what is usual and customary among Bro-

<sup>1</sup> 2 Sedgw. on Damages (7th ed.), 86.

<sup>2</sup> Ante, p. 123 et seq.

<sup>3</sup> Giddings vs. Sears, 103 Mass. 311.

kers in matters about which they are employed. We have also considered, in the third chapter, the subject of the right of the Stock-broker to his commissions,<sup>1</sup> so as to render a mere reference to it only necessary.

In concluding this work the author may be again permitted to remark that, in the determination of contests between Stock-brokers and their Clients, the courts have in most instances drawn largely upon the rules of law governing the relation of principal and agent. Those rules, however, will not always apply; for cases will doubtless arise out of transactions in stocks, so anomalous and novel, when contrasted with the ordinary dealings of principal and agent, as to render it incongruous and impossible to apply the principles of law which govern the latter relation. From this condition of affairs there will gradually, in process of time, grow up a body of law *sui generis* in its nature, and into which will be incorporated many of the usages of Stock-brokers and Stock Exchanges.

<sup>1</sup> P. 231.

**APPENDIX**

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**CONSTITUTION AND BY-LAWS**

**OF THE**

**NEW YORK STOCK EXCHANGE**

REVISED SEPTEMBER 15TH, 1878

WITH AMENDMENTS TO FEBRUARY, 1882



## PREAMBLE.

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*Whereas*, on the first day of May, 1869, in consolidating the GOVERNMENT DEPARTMENT with the NEW YORK STOCK EXCHANGE, said Exchange voted, "That the whole government of the New York Stock Exchange shall be vested in the President, Treasurer, Secretary, and a committee of twenty-eight; the first committee elected to serve in classes, each class to be composed of seven members. Class One to serve one year, Class Two to serve two years, Class Three to serve three years, Class Four to serve four years. After the first year, seven members to be elected each year, to serve for four years. The committee to have power to elect members, to fill vacancies occurring during the year, to serve until the next annual election, at which time the Board shall fill the vacancies for the unexpired term," and "that all articles and parts of articles of the Constitution and By-laws inconsistent with the foregoing action be, and they are hereby, repealed." And

*Whereas*, on the eighth day of May, 1869, in consolidating with the "Open Board of Stock-brokers," said New York Stock Exchange voted, "There shall be chosen from the Open Board of Brokers twelve new members of the Committee of Management, making the whole Board of Management consist of forty members."

On the tenth day of May, 1869, the New York Stock Exchange, at its annual election, did elect said Committee of twenty-eight, and on the eleventh day of May, 1869, twelve members of the Open Board of Brokers were added to said committee, making the whole number consist of forty members.

*Now, therefore*, the whole government of the New York Stock Exchange is vested in the afore-mentioned Committee of Forty—elected in classes as follows: First Class, to serve one year; Second Class, to

serve two years; Third Class, to serve three years; Fourth Class, to serve four years—and its President, Treasurer, and Secretary.

The Governing Committee, in accordance with the directions of the above resolutions, and the power in them vested thereby, do hereby publish the subjoined Constitution and By-laws for the government of the New York Stock Exchange.



# CONSTITUTION.

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## ARTICLE I.

### TITLE OF THE ASSOCIATION.

The title of this Association shall be the NEW YORK STOCK EX-  
Title. CHANGE.

## ARTICLE II.

### ELECTIONS, OFFICERS, AND ASSISTANTS.

SECTION 1. The whole government of the Exchange shall be vested  
Government of Exchange, in a Governing Committee, composed of the President  
how vested. and Treasurer of the Exchange, and of forty members  
elected in the manner hereinafter provided. The members of the  
Governing Committee, together with the Vice-President and Secretary,  
shall be the officers of the Exchange.

There shall also be annually elected, or appointed, as hereinafter  
provided, a Chairman, a Vice-Chairman, and a Roll-keeper.

SEC. 2. The President, Treasurer, Secretary, Chairman, and Vice-  
Officers. Chairman shall be elected by ballot, on the second Mon-  
Vacancies, day of May in each year.  
how filled.

There shall also be elected, at the same time, ten members of the  
Governing Committee, to fill the vacancies occasioned by the outgo-  
ing class, and to hold office for the four years ensuing, and also mem-  
bers to fill any vacancy or vacancies in the other classes for the unex-  
pired terms. The candidate or candidates having the largest number  
of votes shall be declared elected.

SEC. 3. The Governing Committee, at its first meeting after the  
Vice-Presi- annual election, shall choose from its own members the  
dent chosen. Vice-President of the Exchange. It shall also appoint  
Roll-keeper the Roll-keeper.  
appointed.

**SEC. 4.** In case a vacancy shall occur in either of the offices of President, Treasurer, Secretary, Chairman, or Vice-Chairman, a new election by ballot shall be held forthwith to supply such vacancy.

**Vacancies in elected and appointed offices.** In case a vacancy shall occur in the Governing Committee, by resignation or otherwise, it shall be filled by said committee until the next annual election, when the Stock Exchange shall fill the vacancy for the unexpired term.

In case a vacancy shall occur in the office of Vice-President or in the position of Roll-keeper, the same shall be filled by the Governing Committee at its next meeting.

**SEC. 5.** No person shall be eligible to any office in the Stock Exchange who shall not be, at the time of his election, a member in good standing.

**Eligibility to office.**

### ARTICLE III.

#### GOVERNING COMMITTEE.

**SECTION 1.** All powers necessary for the government of the Exchange shall be vested in the Governing Committee. They shall have power to try all offences under or against the laws of the Exchange, and all charges against members, and their decision shall be final.

**SEC. 2.** The Governing Committee may, at any time during the pendency of a case before any of the standing committees, ask for such information and give such instructions as they may deem proper.

**SEC. 3.** Any member of a standing committee, before which a case may be pending shall have the right, during the consideration of such case, or within two days after a decision has been made thereon, to demand a reference of the same to the Governing Committee, for final adjudication; and the Chairman of the standing committee shall notify the President of the Governing Committee of such reference at the next regular meeting. No member of the Governing Committee shall participate in the adjudication of a case in which he is personally interested.

**Final reference to Governing Committee.**

**Members of Governing Committee interested in cases.**

MEETINGS, how to be called. SEC. 4. The President may call a meeting of the Governing Committee at any time. He shall call a meeting at the request of ten members. In the absence of the President, any ten members of the Governing Committee may call a meeting by written announcement from the rostrum.

A majority of all the members of the Governing Committee, or of any sub-committee, shall be necessary to constitute a quorum.

ABSENTEES. SEC. 5. Any member of the Governing Committee who, except in case of illness, or leave obtained from the Presiding Officer, shall absent himself from the meetings of the committee during three consecutive regular meetings shall, *ipso facto*, cease to be a member of the Governing Committee; and the vacancy so occurring shall be filled as provided in Art. II. of the Constitution.

## ARTICLE IV.

### STANDING COMMITTEES.

As speedily as possible after each annual election, the Governing Committee shall appoint from its own members the following standing committees for the year. Should special exigencies require, the President shall have the right to appoint committees *ad interim*, to act until the regular appointments are made.

FINANCE COMMITTEE. *First.*—A Finance Committee, who shall have control of all disbursements. They shall hold regular monthly meetings at a date prior to that fixed for the first monthly meeting of the Governing Committee, at which meetings shall be examined the trial balance of the various accounts, with the necessary vouchers; and they then acting as a Board of Audit shall certify to the same by endorsing it, and handing it to the President.

COMMITTEE OF ARRANGEMENTS. *Second.*—A Committee of Arrangements, to whom shall be referred the enforcement of all rules and regulations necessary to good order and the comfort of the members. They shall determine the number, duty, and pay of all employes other than the officers; and shall have a general supervision of all the departments of the Stock Exchange. They shall present to the Governing Committee, at the first regular meeting in the months of January, April,

July, and October, a report of their disbursements during the preceding three months.

*Third.*—A Committee on Admissions, to consist of fifteen members, to whom shall be referred all new applications for membership, and all applications of suspended members for readmission. But no application for admission or readmission of a person who has ceased to be a member of the Exchange through violation of its Constitution or By-laws shall be referred to the Committee on Admissions, unless he has first obtained the consent of two thirds of the members of the Governing Committee present when such application is considered.

They shall determine the manner and form in which their proceedings shall be conducted. Two thirds of the committee approving, the candidate shall be declared elected or re-elected to a membership in the Exchange.

The Chairman of the committee shall inform the Presiding Officer of the Exchange of the admission or readmission of any applicant, and the said Presiding Officer shall announce the same to the Exchange.

It shall also be the duty of this committee to consider and dispose of all applications for the transfer of membership under Article XIII. of the Constitution.

The members of this committee who shall attend the meetings shall receive Five Dollars each for every meeting; to be paid by the Exchange. The compensation of the Chairman shall be fixed at the rate of Fifteen Hundred Dollars per annum, in lieu of all other compensation.

*Fourth.*—A Committee on Securities, to whom shall be referred for adjudication all disputed questions as to the regularity of Stock Certificates, Bonds, etc. (other than those of the U. S. Government) dealt in at the Exchange, and all applications for placing on the list the securities of the several States.

*Fifth.*—A Committee on Government Securities, to whom shall be referred all applications for placing on the list the issues of the Securities of the United States Government; and, for adjudication, all disputed questions in regard to the same.

*Sixth.*—A Committee on Stock List, to whom shall be referred the

arrangement of the Calls of Stocks and Bonds, and all applications for placing Stocks, Bonds, etc., other than the Securities of the United States Government and of the several States, on the list dealt in at the Exchange.\*

They shall also have power to transfer Stocks and Bonds from the free list to the regular list, and from the regular list to the free list, as they may deem proper.

*Seventh.*—An Arbitration Committee, to consist of nine members, whose duty it shall be to investigate and decide all claims and matters of difference between members of the Exchange arising from transactions in Bonds, Bullion, Stocks, or other Securities, or from any transactions in money. Provided, however, that the Arbitration Committee shall, on the application of either one of the parties, or at their discretion, have the power to dismiss the case, and refer the parties to their legal remedy. They shall also adjudicate such claims arising from differences, as aforesaid, as may be preferred against members by non-members, when such non-members shall agree to abide by the rules of the New York Stock Exchange in such cases provided (*vide* By-laws, Art. XXVIII.). The decision of this committee shall be final in all cases, unless an appeal be taken by a member of the Committee, as provided in Art. III., Sec. 3, Constitution, or in cases involving a sum of \$2500 or over, when either party may appeal, within ten days, to the Governing Committee for a final adjudication.

The members of the Arbitration Committee present shall receive Five Dollars each for hearing a case that shall be heard and decided at one meeting. For all cases occupying the attention of the committee at more than one meeting, Ten Dollars. No compensation to be paid to any member absent from the meetings of the committee.

The Chairman of the Arbitration Committee shall receive an additional fee of Five Dollars in each case.

The losing party in all adjudicated cases to pay the expenses. In cases of appeal from decisions of the Arbitration Committee by either of the parties in interest, the testimony shall be printed at the expense

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\* All applications for the admission of Securities to the stock list shall be accompanied by a fee of Fifty Dollars, to cover the cost of printing and other expenses of the committee; said fee to become the property of the Exchange, whether the application is accepted or rejected.

of the party appealing. But on the final hearing of a case the cost of printing shall be taxed against the losing party to the appeal.

*Eighth.*—A Law Committee, to whom shall be referred all questions of law affecting the interests of the Exchange.  
Law Committee.

*Ninth.*—A Committee on Printing, whose duty it shall be to order and supervise the printing for the Exchange.  
Committee on Printing.

*Tenth.*—A Committee on Commissions, whose duty it shall be to see that the rules relating to commissions are complied with, and report to the Governing Committee any violation thereof.  
Committee on Commissions.

*Eleventh.*—A Committee on Insolvencies, to consist of three members, shall be selected by the Committee on Admissions from their own number at their first meeting in each year, whose duty it shall be to investigate every case of insolvency immediately after the announcement thereof to the Exchange. Should they ascertain the same in any case to have been occasioned by reckless dealing, or doing business for improper parties, they shall report the result of their examination to the Governing Committee. They shall also deliver, in every case, a copy of their records to the Committee on Admissions. Vacancies occurring in this committee shall be filled by the Committee on Admissions from their own number.  
Committee on Insolvencies.

*Twelfth.*—A Committee on Mining Securities, to whom shall be referred all applications for placing on the list the issues of the Securities of mining companies; and, for adjudication, all disputed questions in regard to the same.  
Committee on Mining Securities.

## ARTICLE V.

### DUTIES OF THE PRESIDENT AND VICE-PRESIDENT.

It shall be the duty of the President to see that the several provisions of the Constitution and By-laws are enforced, and to have a care of the general interests of the Exchange. He shall be entitled to preside over the Exchange during debate, or whenever he may elect so to do, and he shall be a member and President of the Governing Committee.  
President.

The Vice-President shall, in the absence of the President, assume all the functions and powers and discharge all the duties of President.

In case of the temporary absence or inability to act of both the President and Vice-President, the Governing Committee may choose from their own number an acting President of the Exchange *pro tem.*

## ARTICLE VI.

### CHAIRMAN AND VICE-CHAIRMAN.

It shall be the duty of the Chairman to preside over the Board whenever it shall be assembled for business; to call Stocks and Bonds, maintain order, enforce the rules, and perform such other duties as the Governing Committee may regard as properly pertaining to the office.

The Vice-Chairman, in the absence of the Chairman, shall assume all his duties and functions.

Neither the Chairman nor the Vice-Chairman shall be permitted to operate in Stocks during the period he is presiding.

In the absence of both, the President may appoint, or the members present may choose, a Chairman *pro tem.*, with full powers.

The calls of Stocks in the Government Department, as well as at the sessions in the Board Room, shall devolve on the Chairman and Vice-Chairman.

The Presiding Officer shall determine all questions of order.

## ARTICLE VII.

### TREASURER.

It shall be the duty of the Treasurer to receive and take charge of all moneys, and render a statement of the funds on the second Monday of May, annually, and at such other times as the Governing Committee may require; he shall also be a member of the Governing Committee and of the Finance Committee.

## ARTICLE VIII.

### SECRETARY.

It shall be the duty of the Secretary to record in a book of minutes the proceedings of the Stock Exchange, and to take

charge of the books and papers of the Association. He shall conduct the correspondence of the Exchange, and keep a record of the closing and opening of the transfer-books for dividends, elections, etc., of the various corporations whose stocks are dealt in at the Exchange; the amount of such dividends, and when payable; and shall post the same on the bulletin-board. He shall also keep a ledger containing the names of all the members, the date of admission by purchase or otherwise, and all transfers of memberships, also a list of suspended members; and shall discharge such other duties as the Governing Committee may regard as properly pertaining to the office. He shall also be the Secretary of the Governing Committee.

## ARTICLE IX.

### ROLL-KEEPER.

It shall be the duty of the Roll-keeper to keep a list of the members, to record all fines, and also to report to the Exchange, Roll-keeper. on the first day of May and November respectively, the amount levied on each member, and to collect and pay the same into the hands of the Treasurer.

## ARTICLE X.

### APPLICATIONS FOR MEMBERSHIP, ELIGIBILITY, INITIATION FEE.

Applications for membership. SECTION 1. All applications for membership shall be publicly announced by the Presiding Officer of the Stock Exchange, together with the name of the member nominating, and the name of the member seconding, the applicant.

SEC. 2. Every applicant for membership must be at least twenty-one years of age and a citizen of the United States.

The initiation fee of members admitted by election shall be Twenty Thousand Dollars, and that for members admitted by transfer shall be One Thousand Dollars.

In all cases when the initiation fee shall not be paid within five days after the admission of a member and his notification by the Secretary, such admission shall be declared void.

## ARTICLE XI.

### MISSTATEMENTS OF APPLICANTS.

Misstatements of applicants. Whenever it shall appear to a majority of the Committee on Admissions that a wilful misstatement upon a material point has been made to them by an applicant for admission or



readmission, they shall report the case to the Governing Committee, who shall, by a two-third vote of the members present, deprive the offending party of his membership, or declare him forever ineligible for admission, as the case may be.

## ARTICLE XII.

### PLACES OF BUSINESS, PARTNERSHIPS, AND DISSOLUTIONS.

**SECTION 1.** Every member must have, in the vicinity of the Exchange, a place of business other than the Exchange, where comparisons may be made at any time during the day after the expiration of one hour from the time of the transaction, and where all notices may be served; and it shall be the duty of every member to keep filed with the Secretary a written notice, designating such place of business, and similarly to give notice of any change thereof.

Any member neglecting to comply with this rule may be considered in default on his contracts, and such contracts may be closed out according to Sec. 1, Art. XVIII., of the By-laws.

**SEC. 2.** Whenever a member shall form a partnership with any other member or person, he shall immediately give written notice thereof to the President, and announcement of the same shall be made to the Exchange by the Presiding Officer, and notice of such partnership shall then be posted in the Board Room for the period of ten days. Any member failing to comply with this article shall be suspended, at the discretion of the Governing Committee.

**SEC. 3.** In like manner notice must be given of any dissolution of partnership; and it shall be the duty of the Secretary to keep a record of all partnerships and dissolutions.

## ARTICLE XIII.

### TRANSFER OF MEMBERSHIP.

Any member shall have the right to transfer his membership under the provisions of the following sections:

**SECTION 1.** When any member wishes to transfer his membership, the name of the proposed transferee shall be submitted to the Committee on Admissions; and, on the approval of two thirds of said committee, the transfer may be made, provided the

member transferring has no unsettled contracts (*vide* Const., Art. XIV.).

SEC. 2. When a member dies, his membership may be disposed of by the Committee on Admissions; and, after satisfying the claims of the members of the Stock Exchange, they shall pay any balance to the legal representatives of the deceased.

In every case where a member is deprived of his membership, or declared ineligible for readmission by the Governing Committee, by reason of any offence against or under the laws of the Exchange, his membership may be disposed of forthwith by the Committee on Admissions.

SEC. 3. In no case shall any transfer of membership be permitted until all dues to the Stock Exchange shall have been paid in full, said dues being hereby declared a prior lien upon the proceeds, to be satisfied in full before any distribution thereof shall be made.

## ARTICLE XIV.

### SUSPENDED MEMBERS, READMISSION, CLAIMS OF CREDITORS, ETC.

SECTION 1. Any member who fails to comply with his contracts, or who becomes insolvent, shall be suspended until he has settled with his creditors. Such member shall immediately inform the President, in writing, that he is unable to meet his engagements; and it shall be the duty of the Presiding Officer thereupon to give notice, from the chair, of the suspension of such member. The Secretary shall record the failure of such member in a book kept for that purpose.

In default of giving such information, the party, on application for readmission, shall not be entitled to a reference of his case to the Committee on Admissions, unless two thirds of the members of the Governing Committee present shall vote in favor of such reference.

SEC. 2. When a suspended member applies for readmission, he shall be required to furnish to the Chairman of the Committee on Admissions a list of his creditors and a statement of the amounts owing, and the nature of his settlement in each case.

The committee shall give notice, for three consecutive days, through

the Presiding Officer of the Stock Exchange, and by posting the same on the bulletin-board provided for that purpose, of the time and place of meeting to consider the application of the suspended member and the claims of creditors.

Upon the applicant presenting satisfactory proof of his settlement with all his creditors, the committee shall proceed to ballot for him, in accordance with its prescribed rules and regulations. Failing of a re-election, the applicant shall be entitled to be balloted for at any five subsequent regular meetings of the committee, to be designated by himself. Provided, however, that the six ballotings to which the applicant shall be entitled shall be within one year from the time of his first application for readmission. If, after six ballotings, as aforesaid, the candidate is rejected, he may appeal, within sixty days thereafter, to the Governing Committee, whose action in the case shall be final.

If rejected by the Governing Committee, he shall cease to be a member of the New York Stock Exchange, and his name shall forthwith be stricken from the roll, and his membership shall be disposed of by the Committee on Admissions.

The question on appeal, however, shall not be taken unless at least thirty-five members of the Governing Committee are present; and it shall require an affirmative vote of at least twenty-nine members to reinstate the applicant.

Whenever the Governing Committee shall determine, upon the report of the Committee on Insolvencies, that the failure of a member has been caused by his doing business in a reckless and unbusiness-like manner, he may be declared ineligible for readmission by a majority vote of the entire Governing Committee.

SEC. 3. If any suspended member fails to settle with his creditors, and apply for readmission within one year from the time of his suspension, his membership shall be disposed of by the Committee on Admissions, and the proceeds paid *pro rata* to his creditors in the Exchange. The Governing Committee may, by a vote of two thirds of the members present, extend the time for settlement, and for application for readmission, of such suspended member.

No claims growing out of transactions between partners shall be admitted to share in the proceeds of the membership of one of such partners until after the claims filed by other

Suspended members, how readmitted.

Appeal of suspended members.

Members doing business in a "reckless manner."

Settlements to be made within one year.

Claims of partners.

creditors who are members of the Exchange shall have been satisfied.

SEC. 4. Any creditor failing to file with the Secretary of the Committee on Admissions a written statement of his claim against a member, prior to the transfer of the right of membership of such member, shall forfeit all right to a distributive share of the proceeds of such membership.\*

SEC. 5. No member of the Exchange shall be allowed to take as partner any suspended member thereof, during the period of his suspension, or to form a partnership with any insolvent person, or with any person who may have previously been a member of the Exchange and against whom any member may hold a claim arising out of transactions made during the time of such membership, and which has not been settled or released in accordance with the laws of the Exchange.

## ARTICLE XV.

### ELECTIONS, QUORUMS, MEMBERS OF A FIRM VOTING, ETC.

SECTION 1. Any member of the Exchange shall be entitled to vote at an election for Officers.

SEC. 2. The members present at the daily sessions of the Exchange shall constitute a quorum for the settlement of disputes growing out of the purchases and sales made during such sessions.

When the Stock Exchange shall be assembled to vote on questions other than the above, a majority of all the members of the Exchange shall be necessary to a quorum.

SEC. 3. But one member of a firm shall be allowed to transact business in the same security at the same time, or vote on the questions of dispute referred to in Sec. 2.

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\* "No difference growing out of a claim on a Put or Call notified for and reduced to a contract after failure will be recognized as entitled to a distributive share of the proceeds of a membership. But this ruling shall not be interpreted as affecting a right to any balance which may remain after the distribution made upon contracts existing prior to a failure."

## ARTICLE XVI.

### FICTITIOUS SALES, BIDS, AND OFFERS.

**SECTION 1.** No fictitious sales shall be made. Any member contravening this section shall, upon conviction, be expelled.

**SEC. 2.** Any member who shall make fictitious or trifling bids or offers, or who shall offer to buy or sell a stock or security at a less variation of one eighth of one per cent., shall, upon conviction, be subject to suspension or such other penalty as the Governing Committee shall impose.

## ARTICLE XVII.

### PAYMENTS AND DELIVERIES IN CERTAIN CASES TO BE SIMULTANEOUS.

In all deliveries of stocks, bonds, etc., the party delivering shall have the right to require the purchase money to be paid at the time and place of delivery.

## ARTICLE XVIII.

### COMMISSIONS.

**SECTION 1.** Commission shall be charged and paid, under all \* circumstances, both upon the purchase and sale of stocks, bonds, and other securities, either for members of the Exchange or for other parties, and the minimum rates on all securities other than Gold, Government Bonds, and Exchange, shall be upon the par value thereof, as follows:

*One eighth* of one per cent., when the transaction is made for any party not a member of this Exchange. No business shall be done at less than this rate for any persons or firms not members of this Exchange, nor for any banking or other institution. The minimum rate to members of the Exchange shall be *one thirty-second* of one per cent., except where one member merely buys or sells for another (giving up his principal on the

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\* What is known as a "turn" of stocks or bonds involves two transactions, viz.—a purchase and a sale; and a commission must be charged upon each.—*Resolution of Governing Committee.*

day of the transaction), and does not receive or deliver the stock, in which case the rate shall not be less than *one fiftieth* of one per cent.\*

The commission on Mining Stocks selling in the market at not over \$5 per share, shall be *Three dollars and twelve and one-half cents*; on shares selling at not over \$10, and above \$5 per share, *Six dollars and twenty-five cents*; on shares selling above \$10 per share, *Twelve dollars and fifty cents* (per 100 shares).

The minimum commission to members of the Exchange shall be \$1 per \$100, on all shares selling at \$10 and below. But in all other

\* The Governing Committee, at a meeting held June 2, 1875, confirmed the following rulings of the Committee on Commissions:

1st. It is the decision and ruling of this Committee, that a less charge than seven per cent. interest for carrying stocks, allowing any interest on short sales, or in any way, directly or indirectly, making any arrangement *having in view a rebate on one eighth per cent. commission*, is an evasion and a violation of the Commission Law.

2d. That, under all circumstances, joint-account transactions between members and non-members of the Exchange must be charged one eighth per cent. commission.

3d. No member or firm can speculate on his or their account, on the guarantee against loss of a non-member for any portion of the profits, without charging that account one eighth per cent. commission.

4th. No bonus or *pro rata* percentage of commission can be given any clerk or individual for business procured for any member of the Exchange.

5th. Partners who are not members of the Exchange must be charged full rates upon their individual business.

6th. Any person or firm having speculative accounts under any name not defining the individual or parties interested, such as "Lake Shore," "Erie," "Union Pacific," etc., etc., in which a non-member is a copartner, must be charged one eighth per cent.

7th. The giving-up of a Clearing-house on transactions on the floor of the Exchange shall not be considered as the giving-up of a principal, unless a member of the Clearing-house gives the order, and is responsible therefor.

And June 26, 1878, the following ruling:

In case stocks are received or delivered on *privileges*, the following ruling shall be observed:

When payment is tendered with a "call," or stock is tendered with a "put," without notification, the rate of commission may be subject to agreement; but in all cases where payment or stock is not so tendered with the privilege, the full rate of commission shall be charged on such receipt or delivery.

The placing of capital as a special partner by a member of the Exchange in a firm where no other person in the firm is a member of the Exchange, does not entitle such a firm to have its business done by members of the Exchange at a less rate than is charged to all non-members.—*Ruling of the Governing Committee, Sept. 10, 1879.*

cases the rate shall be the same as directed in this Article referring to Railroad Stocks.

SEC. 2. Any member violating this Article, directly or indirectly, shall, upon conviction, cease to be a member of the Stock Exchange, and his membership shall be disposed of forthwith by the Committee on Admissions.

Any member who shall be convicted of *offering* to do business for less than the foregoing rates shall be considered as having violated the Commission Law, and shall be subject to the penalty for so doing.

SEC. 3. The Governing Committee may, in its discretion, suspend the penalties named in the foregoing section.

## ARTICLE XIX.

### ALL DEBTS BINDING, ETC.

All debts, without distinction, are binding upon the members of the Exchange, and the Governing Committee will take cognizance of them upon complaints properly made and presented (*vide* By-laws, Art. XXVIII.).

## ARTICLE XX.

### MEMBERS GUILTY OF OBVIOUS FRAUD.

Should any member be guilty of obvious fraud, of which the Governing Committee shall be the judge, he shall, upon conviction thereof by a vote of two thirds of the members of said committee present, be declared by the President to be expelled, and his membership shall escheat to the Exchange.

## ARTICLE XXI.

### OBLIGATION TO ABIDE BY THE CONSTITUTION AND BY-LAWS.—PENALTY.

SECTION 1. Every member shall, within five days after his admission, and his notification thereof by the Secretary, sign the Constitution and By-laws, and pledge himself to abide by the same, and by all subsequent amendments thereof, and also by all rules or regulations then existing, or which may thereafter be adopted.

SEC. 2. Any member reported to the Governing Committee for re-  
 Penalty for vi- fusing to comply with the laws of the Exchange, or for  
 olution there- of. any violation thereof, shall be allowed an opportunity of  
 being heard before them; and if said committee decide that the com-  
 plaint is proved, they shall inflict such penalty as may be prescribed  
 by the Constitution or By-laws; or, where no penalty is specified,  
 such as they may deem proper, according to the gravity of the of-  
 fence.

SEC. 3. No expulsion or suspension of a member shall affect the  
 Rights of rights of creditors as provided for in the Constitution  
 creditors. and By-laws.

## ARTICLE XXII.

### LEGAL INTERFERENCE WITH OFFICERS OR COMMITTEES.

Any member of the New York Stock Exchange who shall himself,  
 No legal in- or whose partner or partners shall, apply for an injunction  
 terference. or legal instrument restraining any officer or committee of  
 the Exchange from performing his or its duties under the Constitu-  
 tion and By-laws shall by that act cease to be a member of the asso-  
 ciation.

## ARTICLE XXIII.

### ALTERATIONS OF THE CONSTITUTION AND BY-LAWS.

All alterations of the Constitution and By-laws shall be made by a  
 Constitution vote of two thirds of the members of the Governing Com-  
 and By-laws, mittee present, and shall be submitted to the Stock Ex-  
 alterations to change; and if not disapproved by a majority of all the  
 be submitted members in good standing within one week, they shall  
 to Stock Ex- stand as the law of the Association.  
 change.

But no alteration of the article now known as Article XXIV. shall  
 ever be made which shall impair, in any essential particular, the obli-  
 gation of each member to contribute as therein provided to the pro-  
 vision for the families of deceased members.

## ARTICLE XXIV.

### PROVISION FOR THE FAMILIES OF DECEASED MEMBERS.

Every member of the New York Stock Exchange shall be subject  
 Provision for to the conditions, and entitled to partake of the benefits,  
 families of de- of the plan for providing for the families of deceased  
 ceased mem- members hereinafter set forth:  
 bers.



1. Upon the death of any member of the Exchange, there shall be levied and assessed against each surviving member the sum of Ten Dollars, which shall thereupon become a due from him to the Stock Exchange, and charged against the membership of such surviving member, to be collected as other fines and dues are or may then be collected.

2. The faith of the New York Stock Exchange is hereby pledged to pay, within one year after proof of death of any member, out of the money so collected, the sum of Ten Thousand Dollars, or so much thereof as may have been collected, to the persons named in the next section, as therein provided, which money shall be paid as a *gratuity* from the surviving members of the Exchange, free from all debts, charges, or demands whatever.

3. Should the member die leaving a widow and no children, then the whole sum shall be paid to such widow for her own use.

Should the member die leaving a widow and children, then one half shall be paid to the widow for her separate use, and one half to the children for their use, share and share alike; provided, that the share of minor children shall be paid to their guardian, and that the issue of any deceased child shall be entitled to receive the share which said child would have received if living—if of age, directly; or if minors, through his, her, or their guardian or guardians.

Should the member die leaving children and no widow, then the whole sum shall be paid to the children, as directed in the preceding section to be done with the moiety.

Should the member die leaving neither widow nor children, then the whole sum shall be paid to the next of kin of the deceased, within the limit of representation prescribed by the Statutes of New York; and if there be none such, then to the established claimants for the proceeds of the membership of the deceased, under the rules of the Stock Exchange.

In all cases a certified copy of the proceedings before a Surrogate or Judge of Probate shall be accepted as proof of the rights of the claimants, be deemed ample authority to the Stock Exchange to pay over the money, shall protect the Exchange in so doing, and shall release the Exchange forever from all further claim or liability whatsoever.

4. Nothing herein contained shall ever be taken or construed as a joint liability of the Exchange or its members for the payment of

any sum whatever; the liability of each member, at law or in equity, being limited to the payment of Ten Dollars only on the death of any other member, and the liability of the Exchange being limited to the payment of the sum of Ten Thousand Dollars (or such part thereof as may be collected) after it shall have been collected from the members, and not otherwise.

5. Nothing herein contained shall be construed as constituting any estate *in esse* which can be mortgaged or pledged for the payment of any debts; but it shall be construed as the solemn agreement of every member of the Stock Exchange to make a voluntary gift to the family of each deceased member, and of the Exchange to collect and pay over to such family the said voluntary gift; it being understood, and hereby expressly declared, that the provisions of this Article XXIV. of the Constitution shall only be in force in, and apply to, cases of death which shall take place after its adoption.

6. It is hereby made the special duty of, and enjoined upon, the Governing Committee of the Exchange to increase the surplus revenues of the Exchange as far as possible by rigid economy of expenditures, and by increase of receipts in every legitimate way, for the purpose of accumulating a fund to be styled the "Gratuity Fund," to be administered and applied as hereinafter directed.

7. The management and distribution of the Gratuity Fund, and the execution of the provisions of this Article, shall be under the charge of a Board of Trustees, to be known as "The Trustees of the Gratuity Fund," and to consist of the President and Treasurer of the Exchange, and of five other Trustees who shall each hold office for five years, and one of whom shall be elected by the Exchange, by ballot, at each annual election.

In case of any vacancy occurring, the Governing Committee shall fill the same until the next annual election, when the Stock Exchange, shall choose a Trustee for the unexpired term.

It shall be the duty of the Trustees of the Gratuity Fund to keep securely invested, in accordance with the laws of the State of New York regulating trust funds, all moneys paid to them for the fund, together with the annual interest and accretions arising from the same. They shall have power to choose their own chairman, and adopt such by-laws as may be needful, subject to the approval of the Governing Committee, and they shall make an annual report to the Exchange of the condition of the fund.

As soon after the adoption of this Article as the convenience of the treasury will allow, the Treasurer of the Stock Exchange shall pay to the Trustees of the Gratuity Fund the sum of Ten Dollars for each member of the Exchange, said payment to be charged against each member, and collected together with his other dues when they next become payable; and every person who shall become a member of the Exchange after the adoption of this article shall pay to said Trustees the sum of Ten Dollars before he shall be admitted to the privileges of membership.

Whenever the annual income of the Stock Exchange shall exceed its actual current expenses by the sum of Ten Thousand dollars, the surplus shall be divided as follows: Each member shall be credited with his proportion of one half of the total amount divided, in reduction of his annual dues; the other half shall be paid over to the Trustees of the Gratuity Fund.

Whenever the number of deaths of members of the Exchange shall exceed fifteen in any one year, it shall be the duty of the Trustees of the Gratuity Fund to pay out of the fund to the credit of the surviving members, in reduction of their dues for that year, such sums as may be requisite to limit the total payments of each member under this article to One Hundred and Fifty Dollars in any one year; provided, however, that should the fund be exhausted, the liability of each member to make payments in excess of One Hundred and Fifty Dollars shall not thereby be impaired, but, on the contrary, shall remain in full force.

Whenever the Gratuity Fund shall amount to One Million Dollars, the Trustees shall divide the annual income among the members, to be credited in reduction of their annual payments under this Article.

8. The provisions of this Article shall not extend to any member who shall have severed his connection with the Exchange by the transfer of his membership, whether the same is made voluntarily or involuntarily, nor to any member who now is, or hereafter may be, expelled by the Governing Committee, but shall extend to suspended members.

9. The membership of a deceased member, from the date of his death until sold, shall be subject to the same assessments, under the provisions of this article, as the memberships of the surviving members during that period.

First special  
payment.

Division of  
surplus of in-  
come of Ex-  
change.

Deaths in ex-  
cess of a cer-  
tain number.

Transfer of  
membership  
forfeits gratu-  
ity.

Suspended  
members par-  
ticipate.

Memberships  
of deceased  
members lia-  
ble.

# BY-LAWS.

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## ARTICLE I.

### HOURS OF BUSINESS.

SECTION 1. The Exchange shall be opened for the entrance of members upon every business day at ten minutes before ten o'clock A.M.

At ten o'clock precisely the Presiding Officer shall announce from the rostrum that the Exchange is opened for the transaction of business; and it shall remain open for such purpose until three o'clock P.M., when the presiding officer shall similarly announce it closed.

Dealings shall be limited throughout the entire year to the interval between the hours above named, unless otherwise ordered by the Governing Committee; and a fine of Fifty Dollars for each offence shall be imposed upon any member who shall directly or indirectly make any transaction in Stocks or Bonds before or after those hours, in the Exchange or its vicinity.

Dealing in Stocks outside of the Exchange in any public place shall be considered in contravention of the purpose and intent of Article I. of the By-laws, prohibiting transactions, after hours, in the vicinity of the Exchange. The Governing Committee will not recognize or enforce any contracts thus made.

SEC. 2. The Exchange shall not be closed at any time between the hours above named, except by order of the Governing Committee. While so closed, the same penalty shall apply to dealings outside of the Exchange as during the regular time of closing.

## ARTICLE II.

### CALLS.

SECTION 1. The order of business at the regular calls shall be as follows, viz.:

1. Calling the regular list of Stocks or Bonds.

2. Calling Stocks or Bonds on the free list at the request of members.

3. Reverting to Stocks or Bonds at the request of members.

SEC. 2. After the call of the regular and free lists, any Security thereon may be recalled once without a fine; and afterwards by the payment of a fine of Twelve and One Half Cents each time.

SEC. 3. No offers to buy or sell privileges to receive or to deliver Securities shall be made publicly at the Exchange.

### ARTICLE III.

#### APPLICATIONS TO PLACE STOCKS, ETC., ON THE LIST.

All applications for placing Securities on the regular or free list shall be made to the Committee on Stock List, who shall report the same to the Governing Committee, with a full statement of capital, number of shares, resources, etc.

### ARTICLE IV.

#### REGISTRY OF STOCKS.

The Stock Exchange will not call or deal in any active speculative Stock of any company a registry of whose Stock is not kept in some responsible bank, trust company, or other satisfactory agency, and which shall not give public notice at the time of establishing such registry of the number of shares so intrusted to be registered, and shall not give at least thirty days' notice through the newspapers, and in writing to the President of the Stock Exchange, of any intended increase of the number of shares, either direct or through the issue of convertible Bonds, and shall not at the same time give notice of the object for which such issue of Stock or Bonds is about to be made.

### ARTICLE V.

#### BIDS AND OFFERS.

SECTION 1. All offers made and accepted shall be binding.

SEC. 2. In all offers to buy or sell, the offer shall be accompanied with some specific number of shares, the par value of which shall not be less than Five Hundred Dollars, and

when no amount is named, it shall be considered to be for one hundred shares of Stock of the par value of One Hundred Dollars, or Ten Thousand Dollars of Bonds.

No offer to buy or sell a specific lot shall take precedence of any offer to buy or sell a different lot. Offers to buy or sell larger or smaller amounts may be made at the same time and price with one-hundred-share lots.

Offers, order in which they are entitled to the floor. SEC. 3. Offers to buy or sell shall be entitled to the floor in the following order:

1. Bids "seller three days," and offers to sell "buyer three days," shall take precedence of cash and regular.
2. "Cash" and "regular" bids and offers may be made simultaneously, as being essentially different propositions.
3. Offers to buy or sell on longer options than three days may be made at the same time with offers to buy or sell "buyer or seller three."
4. In offers to buy on seller's option, or to sell on buyer's option, the longest option shall have precedence.
5. In offers to buy on buyer's option, or sell on seller's option, the shortest option shall have precedence.

No other bids or offers shall be permitted or have any standing upon the floor.

Members violating the provisions of this section may be reprimanded by the Presiding Officer, and, repeating or persisting in the offence, may be cited to appear before the Governing Committee, who may, in their discretion, suspend the offender for a period of not more than ten days.

Surrender of principal. SEC. 4. No party to a contract shall be compelled to accept a principal other than the member offering to contract, unless the name proposed to be substituted shall be satisfactory, or shall be declared at the time of making the offer.

Liability not to be limited. SEC. 5. No sale of Securities shall be made on which a deposit shall be offered as the limit of liability.

## ARTICLE VI.

### THE TERM "ABOUT."

In all contracts when the term "about" is used, either as to the

time or number of shares, the variation of the former shall not be Term "about." more than three days, nor the latter more than ten per cent.

## ARTICLE VII.

### SETTLEMENT OF DISPUTES AS TO PURCHASE OR SALE OF SECURITIES.

SECTION 1. Whenever there is a disputed claim for the purchase or sale of a Security made during the sessions of the Exchange, the Presiding Officer shall decide the same, or he may appeal to the Board for their decision. If an appeal be made from the decision of the Presiding Officer and seconded by two members, the question shall be put to vote.

Disagree- SEC. 2. In any disagreement between members growing out of the purchase and sale of a Security or Securities, as soon as the same is ascertained, if not settled by mutual agreement, the money difference shall be established forthwith by purchase or sale by an officer of the Stock Exchange, wherever the Exchange may be at the time convened.

SEC. 3. Whenever a buyer or seller fails to get the name of the other party to a transaction, he shall give notice at all the calls of the Exchange on the day of the alleged transaction; and if he fails to find the party, he shall cause the Security or Securities to be purchased or sold through an officer, at the first call of Stocks on the following day, for account of whom it may concern. In any case of this kind, growing out of an alleged transaction made after the afternoon call, notice shall be given in the Exchange, and at the first regular call on the following day; when, if the party cannot be found, the alleged transaction shall be closed at the next regular call in the manner prescribed above.

## ARTICLE VIII.

### HOOR FOR THE DELIVERY OF SECURITIES.

SECTION 1. All deliveries of securities must be made before a quarter-past two o'clock P.M.; and where deliveries are not made by that time, the contract may be closed under the rule, after due notice to the defaulting party, in the manner provided in Article XVIII. of the By-laws. Such notice, however, must be

given not later than half-past two o'clock; and the contract must be closed without delay, unless the time for so doing be extended by mutual consent. In the absence of any notice or agreement, the contract shall continue without interest until the following day. In every case of non-delivery, however, the party in default shall be liable in addition for the damages that may accrue.

SEC. 2. This rule shall apply to borrowed and loaned Securities.  
Borrowed and loaned Securities.

## ARTICLE IX.

### DELIVERIES OF STOCK BY CERTIFICATE AND POWER.

SECTION 1. In the delivery of Stock of which but one transfer in a day is allowed, the receiver shall have the option of receiving said Stock by certificate and power irrevocable, in the name of, witnessed or guaranteed by, a member of the Exchange, or a firm represented at the Exchange, resident or doing business in New York, or by *transfer* thereof.\*

SEC. 2. In all transactions exceeding one hundred shares, where the delivery is by certificate and power, the purchaser shall have the right to require the delivery in certificates of not more than one hundred shares each.

SEC. 3. Powers of attorney, or substitution, signed by trustees, guardians, infants, executors, administrators, or attorneys, shall not be a good delivery.

Detached powers of attorney, or substitution, must be attested by a notary public under seal.

## ARTICLE X.

### TRANSFER-BOOKS CLOSED BY LEGAL IMPEDIMENT.—HOW DELIVERIES SHALL BE MADE.

Whenever the transfer-books of any company shall be closed by any

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\* In the case of powers of attorney, or substitution, not executed or witnessed by a member of the Exchange, or a firm represented at the Exchange, the endorsement of a member or such a firm is to be considered a guarantee of the correctness of the signature of the party executing the same.—*Resolution of Governing Committee, May 24, 1872.*



legal impediment, so as to render their being open again uncertain,  
 When opening of transfer-books is uncertain. then the deliveries of Stock of such company, in satisfaction of contracts, shall be made by certificate and power of attorney irrevocable, with notarial acknowledgment and seal, and containing assignment and bill of sale, the papers to be satisfactory to the recipients or passed upon by the Committee on Securities.

## ARTICLE XI.

### IRREGULARITIES IN DELIVERIES.

Reclamations for irregularities in deliveries of Stocks or Bonds,  
 Irregularities in deliveries. when such irregularities do not affect their validity, but only currency in market, will not be considered unless made within ten days from the day of delivery.

## ARTICLE XII.

### STOCKS, WHEN DUE.—HOLIDAYS.

SECTION 1. All purchases and sales shall be settled for on the next  
 Stocks, regular way. business day, unless expressed to the contrary.

SEC. 2. All contracts falling due on Sundays, or on such holidays  
 Holidays. as are observed by the banks, shall be settled on the preceding day.

But where two holidays occur on consecutive days, as where Sunday immediately precedes or follows a legal holiday—  
 Consecutive holidays. contracts falling due upon the first of such holidays shall be settled upon the business day immediately preceding, and those maturing upon the second of such holidays shall be settled upon the business day next following the same.

## ARTICLE XIII.

### CONTRACTS MATURING DURING CLOSING OF TRANSFER-BOOKS.—DUE BILLS.

All contracts in Stocks falling due during the regular closing of the  
 When transfer-books are closed. transfer-books of any company shall be settled at maturity by the delivery of a certificate and power of attorney, as defined in Article IX. of the By-laws; and contracts at the option of the buyer or seller may be notified for settlement, as if the books

were open; and in case the books are closed for a dividend, the party entitled thereto shall receive a due-bill therefor, signed or endorsed by the seller of the stock; but the party entitled to the dividend shall have the right to require a deposit in a trust company, payable to the joint order of the purchaser and seller, of the amount of such due-bill.

## ARTICLE XIV.

### CONTRACTS.

**SECTION 1.** No contracts for the purchase or sale of Securities beyond sixty days shall be made in the Stock Exchange.

Contracts  
limited to  
sixty days.

**SEC. 2.** In all contracts on time over three days, made at the option of the buyer or seller, one day's notice shall be given before Securities can be delivered or demanded, and such notice shall be given at or before two o'clock P.M.

Notice  
required.

## ARTICLE XV.

### INTEREST.

**SECTION 1.** No purchase or sale, at the option of the buyer or seller, for three days, or "at three days," shall bear interest. All purchases and sales beyond that time shall be with interest.

When con-  
tracts bear  
interest.

**SEC. 2.** In all time bargains, the rate of interest shall be six per cent., to be calculated by days, according to bank usage.

Rate of  
interest.

**SEC. 3.** The accrued interest on all Stocks and Bonds not especially excepted in the By-laws shall go to the purchaser.

Accrued  
interest to  
purchaser.

## ARTICLE XVI.

### DIVIDENDS.

**SECTION 1.** On the day of closing of the transfer-books of any stock for a dividend, transactions in such stock for cash shall be "dividend on" up to the time officially designated for the closing of the books; all transactions other than for cash

Closing of  
transfer  
books.

shall be "dividend off" after a quarter-past two o'clock, P.M., or after the closing of the books, should they close before that hour.

**SEC. 2.** When a dividend is declared on a Security during the pendency of a contract, the seller shall collect, hold, allow interest on, and pay the same to the buyer on the settlement of the contract.

**SEC. 3.** Members may charge one per centum for collecting and paying dividends. But where a scrip or stock dividend has been declared by a company, the one per cent. shall be upon the *market* value, and not upon the *par* value, of the scrip or stock.

**SEC. 4.** No offers to buy or sell dividends on Stocks shall be made publicly at the Exchange.

## ARTICLE XVII.

### MUTUAL DEPOSITS ON CONTRACTS.

**SECTION 1.** In any contract, either party may call, at any time during the continuance of the same, for a mutual deposit of ten per cent. And whenever the market price of the Securities shall change, so as to reduce the margin of said deposit either way below five per cent., either party may call for a deposit sufficient to restore the margin to ten per cent., and this may be repeated as often as the margin may be so reduced.

In all cases where deposits are called before two o'clock P.M., they shall be made at or before two and a half o'clock P.M. the same day. If called after two o'clock P.M., they shall be made at or before eleven o'clock A.M. of the following day.

**SEC. 2.** In case either party shall fail to comply with a demand for a deposit, in accordance with the provisions of this article, the party calling, after having given due notice, may report the default to an officer of the Exchange, who shall repurchase or resell the security forthwith in the Exchange; and any difference that may accrue shall be paid over to the party entitled thereto.

The notice above referred to shall be either personal or shall be left in writing at the office of the party to be notified; or  
 Notice. in case he has no office, then by public announcement whenever the Exchange may be in session.

SEC. 3. Where there is a difference of opinion as regards the place of deposit for the security of purchases and sales, the  
 Place of deposit. same shall be made in the New York Life and Trust Company.

## ARTICLE XVIII.

### DEFAULT.—CLOSING CONTRACTS UNDER THE RULE.

SECTION 1. Should any member neglect to fulfil his contract on the day it becomes due, the party or parties contracting  
 Default in contracts. with him shall, after giving notice as required by Sec. 2 of the preceding Article, employ an officer of the Board to close the  
 How closed. same forthwith in the Exchange by purchase or sale, as the case may require, unless the price of settlement has been agreed upon by the contracting parties.

In case of a failure of a creditor to close the contract as above, the price shall be fixed by the price current at the time such  
 Price, how fixed. contract ought to have been closed under the rule.

In all cases where an officer may be directed to buy or sell Securities under this rule, the name of the member defaulting,  
 Names to be announced. as well as that of the member giving the order, shall be announced.\*

No order for the purchase or sale of Securities under this rule shall be executed unless made out in writing over the  
 Duties of Officers closing contracts. signature of the party giving the order, who shall state the reason therefor; and it shall be the duty of the Officer who executes the order to endorse thereon the name of the purchaser or seller, the price and the hour at which the contract is closed, and hand the same to the Secretary of the Board, who shall, within twenty-four hours, ascertain whether the party for whose account the order was given has paid the difference, if any, arising from the transaction. If not paid, the Secretary shall report the default to the President. The

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\* Contracts in Government Securities closed "under the rule" shall be so closed in the room of the Government Department, and in all other securities in the large room of the Exchange.—*Resolution of Governing Committee, Jan. 12, 1869.*

duty devolved upon the officers of the Exchange under this rule shall be performed without charge.

**Party defaulting not to supply offers.** No party shall be permitted to supply offers to buy or sell Securities closed for his account "under the rule."

**And not to hinder closing contracts.** And when a contract is closed under this rule, any action of the defaulter, direct or indirect, by which the prompt fulfillment of such contract is delayed, hindered, or evaded, to the detriment of the other contracting party, shall subject the offending party to suspension for not less than thirty days, or expulsion from the Exchange, in the discretion of the Governing Committee, by a vote of two thirds of the members present at a meeting.

**Members supplying offers.** When contracts are closed out under the rule, any member supplying the bid or offer, and not duly receiving or delivering the stock, as the case may be, renders himself liable to prosecution under this Article.

Should any Stock thus sold not be delivered until the next day, the contract shall continue; but the party defaulting shall be liable to pay such damages as may be assessed by the Arbitration Committee.

**SEC. 2.** The same rules, as to notice, time, and place, that govern defaults in other contracts shall apply to *borrowed* Securities, which, on non-delivery or receipt, must be borrowed or loaned in open market, except in case of actual default in receiving or delivering, after notice to close the loan; then the same are to be bought or sold, as the case may be, for account of the defaulter, in the manner provided in this Article.\*

**Same rules apply to borrowed Securities.**

## ARTICLE XIX.

### AGAINST UNITING WITH OTHER ORGANIZATIONS.

**SECTION 1.** Any member uniting, directly or by a partner, with any organization where Stocks, Bonds, etc., are dealt in shall cease to be a member of this Exchange. This rule shall

**Uniting with other organizations.**

\* The ordinary form of notice, to the effect that one party will either buy in or sell out Stock for the account of a defaulting party, or hold said party liable for damages, is not sufficient notice to authorize the closing-out of the Stock under the rule.

But if it is intended to close a contract under the rule, positive notice of that intention must be given before 2½ P.M., as required by the By-laws.—*Resolution of Governing Committee.*

not apply to the New York Mining Stock Exchange while its transactions are limited to the class of Securities at present dealt in at that Exchange.

SEC. 2. Any member of the Exchange dealing with a person not a member, in the rooms of the Exchange, shall be subject to the penalty of suspension for not less than sixty days nor more than twelve months.

Dealing with  
non-members,  
penalty.

## ARTICLE XX.

### DUES AND FINES.—PENALTY FOR NON-PAYMENT.

SECTION 1. The dues of all members of the Exchange shall be payable on May 1 and November 1 of each year, and shall be Twenty-five Dollars semi-annually, exclusive of fines and of dues under Article XXIV. of the Constitution.

Dues.

SEC. 2. Any member who shall neglect to pay his fines or dues for three months after they become payable, shall, after due notice, be suspended until they are paid; and if not paid at the end of one year, he shall no longer be considered a member, and his membership may be disposed of by the Committee on Admissions.

Penalty for  
non-payment.

## ARTICLE XXI.

### INDECOROUS LANGUAGE, DISORDERLY CONDUCT, ETC.—PUNISHMENT.

SECTION 1. Any member who shall, during the sessions of the Exchange, use indecorous language to another member, or who shall be guilty of conduct subversive of good order and decorum, or of any act or acts whereby the personal comfort or safety of other members is seriously interfered with, may be fined, at the discretion of the Presiding Officer, in a sum not exceeding Ten Dollars; or may, upon complaint made, be summoned before the Governing Committee, who may suspend him for a period of not more than thirty days. A repetition of the offence may subject him to expulsion, and he shall not be readmitted except by consent of two thirds of the members of the Governing Committee present at a session thereof.

Disorderly  
conduct, etc.

SEC. 2. Any member interrupting the Presiding Officer while call-

Interrupting ing Stocks, by speaking or otherwise, shall pay a fine of  
Presiding not less than Twenty-five Cents for each offence, at the dis-  
Officer. cretion of the Presiding Officer, from which there shall be no appeal.

The levying of all fines shall rest exclusively with the Presiding Officer.

## ARTICLE XXII.

### SMOKING FORBIDDEN.

Any member smoking in the business rooms of the Exchange, or in  
Smoking any other part of the Exchange where the Committee of  
Arrangements may decide to prohibit the same, shall be  
forbidden. fined Five Dollars.

## ARTICLE XXIII.

### INJURING PROPERTY OF THE EXCHANGE.—EMPLOYÉS, ETC.

SECTION 1. If a member injures or destroys the property of the  
Injuring Exchange, it shall be repaired or replaced under the direc-  
property of tion of the Committee of Arrangements, and the expense  
Exchange. charged to such member, in addition to any fines which may be im-  
posed by the Presiding Officer for the offence, under Article XXI. of  
the By-laws.

SEC. 2. If any employé of the Stock Exchange shall deface the  
Misconduct building or injure the property of the Exchange, he shall  
of employés, be discharged forthwith; and if any employé of a mem-  
visitors, or ber of the Exchange, or of a telegraph company, or if  
subscribers. any visitor or subscriber, shall deface or destroy the property of the  
Exchange, or be guilty of rude or improper conduct, he shall be ex-  
cluded from the rooms of the Exchange.

SEC. 3. Any member who shall ignite fireworks or other explo-  
Burning of sives, or burn papers in any part of the Stock Exchange  
fireworks, buildings, shall be subject to a fine of not less then Twenty-  
papers, etc. five Dollars; and upon a repetition of the offence shall be summoned  
before the Governing Committee, who may suspend him for a period  
of not more than sixty days.

## ARTICLE XXIV.

### SPECIAL MEETINGS.—AYES, NOES, ETC.

SECTION 1. Except by unanimous consent, no business shall be  
No business transacted previous to the first call of Stocks.  
before "call."

**SEC. 2.** When any special meeting of the Exchange shall be appointed, the fine for non-attendance may, by a vote of Special meetings. two thirds of the members present, be fixed at a sum not exceeding Five Dollars.

**SEC. 3.** No notice shall be taken of any resolution or resolutions Resolutions. unless submitted in writing.

**SEC. 4.** No member shall speak more than twice on any question Members not to speak more than twice. under discussion by the Exchange, without permission from the Presiding Officer, nor shall any member interrupt another while speaking.

**SEC. 5.** The Presiding Officer shall not participate in any discussion arising in the Exchange while occupying the chair. Presiding Officer, when not to debate.

**SEC. 6.** The ayes and noes shall not be called for upon any question, excepting at the request of one fifth of the members Ayes and noes. of the Exchange present. When the ayes and noes are ordered, a ballot-box shall be placed on the Secretary's desk, and kept open for the reception of votes from 10½ A.M. until 2 P.M. The vote shall be taken by the deposit of a ballot endorsed by the member voting, and containing his vote, ay or no. Said ballots shall be placed on file, in alphabetical order, and preserved for fifteen days. The votes shall be entered upon the roll, opposite to the names of the members who have voted, and such roll shall be placed in the Secretary's desk for the inspection of members.

## ARTICLE XXV.

### ACCESS TO THE MINUTES.

No person shall have access to the minutes of the Exchange except the members or their partners. Minutes of Exchange.

## ARTICLE XXVI.

### COMMUNICATIONS INFLUENCING THE MARKET.

No communications having a tendency to influence the market shall be read to the Exchange without the consent of the Communications influencing market. President or Presiding Officer.



ARTICLE XXVII.

INTRODUCTION OF STRANGERS.

No member shall introduce a stranger on the floor of the Exchange Strangers. unless by permission of the President or Presiding Officer.

ARTICLE XXVIII.

ARBITRATION OF CLAIMS.

Any person shall have the right to bring a claim against a member  
Claims, of the Exchange before the Arbitration Committee, arising from transactions in Bonds, Bullion, Stocks, or other  
nature of Securities, or from any transactions in money, on the conditions following, and not otherwise.

The person making such claim shall execute a full release of his claim  
Release. against said member, duly signed, sealed, and stamped, and shall deliver the same to the Chairman of the Arbitration Committee to be held in trust, to abide the event of the suit before said Committee.

FORM OF RELEASE.

KNOW ALL MEN BY THESE PRESENTS, That I,.....,  
Form of for and in consideration of the sum of One Dollar, to me  
release. in hand paid by ....., the receipt of which is hereby acknowledged, have remised, released, and forever discharged, and by these presents I do hereby remise, release, and forever discharge, the said ..... of and from any and all demands heretofore existing and due and owing to me, and the said ..... is hereby fully released and discharged from the same.

Sealed with my seal, and dated at New York, this ..... day of ....., 18 .. .

The Chairman of the Arbitration Committee shall keep the said release in trust, to abide the result of said suit, and shall  
Disposition deliver the same to the defendant in either of the three  
of release. following cases:

1st. In case the claimant shall not present his claim to the Arbitration Committee within twenty days after executing said release.

2d. In case judgment shall be rendered for said defendant by the Arbitration Committee.

3d. In case the defendant shall pay, or offer to pay, to such claimant the amount of judgment rendered in favor of said claimant.

In case judgment shall be rendered against any member of the Exchange which he is unable or unwilling to pay, then such release shall be cancelled and returned to such claimant.

When release is to be cancelled.

## ARTICLE XXIX.

### THE TRUSTEES OF THE GRATUITY FUND.

1. On the first Monday after the annual election of the New York Stock Exchange, or as soon thereafter as may be practicable, the Trustees of the Gratuity Fund shall organize by electing a Chairman, Secretary, and Treasurer of the Gratuity Fund, who shall serve for one year or until their successors shall be chosen.

Trustees of the Gratuity Fund.

2. There shall be a regular meeting of the Trustees on the third Monday in each month. The Chairman may call a special meeting at any time; he shall call a meeting at the request of two Trustees.

Meetings.

3. At all meetings three shall constitute a quorum.

Quorum.

4. It shall be the duty of the Chairman to preside at meetings; he shall vote on all questions; he shall on the Monday preceding the annual election in the Stock Exchange make a report to the Exchange of the condition of the fund, with a statement by the Treasurer of receipts and disbursements.

Chairman.

Annual report.

5. It shall be the duty of the Secretary to keep regular minutes of the proceedings of the Trustees, and to give notice of meetings.

Secretary.

6. It shall be the duty of the Treasurer to receive and sign vouchers for all moneys paid to the Trustees, which he shall deposit in such institutions as they may direct, to his credit as Treasurer of the Gratuity Fund of the New York Stock Exchange.

Treasurer.

He shall have the custody of all Securities belonging to the fund or held by the Trustees, subject, however, at all times to their examination and direction.

Custody of Securities.

He shall keep, or cause to be kept, proper books of account.

He shall receive and keep a record of all claims for payment under  
Record of Art. XXIV. of the Constitution of the New York Stock  
claims. Exchange, and present the same to the Trustees for their  
 action. When allowed and approved by the Trustees he shall pay  
 the same; but no such payment shall be made until directed by the  
 Trustees.

He shall make such investments for the fund as may be ordered by  
 the Trustees.

His books shall always be open to the inspection of any Trustee,  
Inspection of and he shall make to the Chairman an annual statement  
books. of receipts and disbursements.

He shall receive out of the fund such compensation per annum as  
Compensa- may be fixed by the Trustees and approved by the Govern-  
tion. ing Committee of the New York Stock Exchange.

7. All investments of money belonging to the fund shall be made  
Investment of by the Trustees as directed by Art. XXIV. of the Consti-  
fund. tution of the New York Stock Exchange.

All registered Stock shall be inscribed in the name and to the order  
Registered of "The Trustees of the Gratuity Fund of the New York  
Stock. Stock Exchange," but without specifying the individual  
 names of such Trustees, and may be disposed of and assigned by any  
 three of said Trustees.

In case any person entitled to any gratuity shall be under age, and  
 have no guardian entitled to receive payment at the maturity thereof,  
 the Trustees may, in their discretion, deposit such money with the  
 New York Life Insurance and Trust Company or the United States  
 Trust Company, as the property of, and in trust for, such minor; and,  
 in like manner, if any person apparently entitled to any payment fails  
 to claim, or has disappeared or cannot be found after reasonable in-  
 quiry, the Trustees may deposit the presumptive share of such person  
 in either of said trust companies to the credit of "The Trustees of  
 the Gratuity Fund of the New York Stock Exchange, in trust," to the  
 end that it may be paid to such person if afterwards found, or other-  
 wise to the parties who may subsequently establish their right thereto;  
 and further, that a similar discretion shall apply in the case of any dis-  
 pute between claimants for a gratuity or a portion thereof.

8. The Treasurer of the Gratuity Fund shall be authorized to receive  
 from the members of the Stock Exchange, who may desire to make

payments in advance of the regular maturity of their dues under Art. XXIV. of the Constitution, any sum not less than **Members may advance payments.** Ten Dollars at a time, and issue his receipt therefor; and such receipt shall be received by the Treasurer of the New York Stock Exchange, when the semi-annual dues become payable, as a payment for the amount specified. To facilitate such payments on the part of members, the Treasurer of the Gratuity Fund may avail himself of the services of the Roll-keeper of the Exchange.

9. The Trustees shall have power, at their discretion, to consult and **Disbursements.** employ legal counsel. They shall be authorized to make disbursements out of the fund to defray necessary expenses; but no such disbursements shall be allowed without a resolution, specifying the nature and amount of the same, being entered at large upon the book of minutes of the Secretary. Each Trustee shall receive from the fund Five Dollars for every meeting at which he shall be present.

10. In case of a vacancy occurring in the office of Chairman, Secretary, or Treasurer, the Trustees shall forthwith proceed to **Vacancies.** fill the same for the unexpired term. In case of the temporary absence or inability to act of either Chairman, Secretary, or Treasurer, the Trustees shall have power to appoint one of their number to act in his stead *pro tem.*

11. The Governing Committee of the New York Stock Exchange **Power of Governing Committee.** shall at all times have the right to direct the production before them of the Securities belonging to the fund, the Secretary's book of minutes, and the Treasurer's books of account.

It shall be the duty of the Finance Committee of the Exchange to **Examination of fund.** make an examination of the condition of the fund once in every year; and said committee shall have the right at any time to make such additional examination as they may deem proper.

12. The Governing Committee of the New York Stock Exchange **Charges against Trustees.** shall have the power to try charges against any Trustee for malfeasance or negligence in office, and, by a vote of two thirds of all its members, to suspend him from his functions or declare the office vacant.

13. It shall be the duty of the Treasurer of the New York Stock Exchange to pay over semi-monthly all dues collected under Art. XXIV. of the Constitution to the Treasurer of the Gratuity Fund.

## ARTICLE XXX.

### THE ACCOUNT.

SECTION 1. Transactions may be made in Government Securities for the account under the following regulations:

The fifteenth and last days of each month shall be known as "settling-days," and transactions may be made on any days within those periods for settlement on those days respectively, and without interest.

Transactions made for the account on settling-day, unless for cash, shall be considered as for the next account.

Either party to a transaction may call for an original margin of two per cent. to be deposited jointly in a Trust Company; and should the market price vary at any time one per cent. from the contract price, such difference shall be deposited in the Trust Company by the party against whom it exists, when notified in accordance with Art. XVII. of the By-laws.

SEC. 2. A committee of three shall be appointed by the President, who shall have power, in case of non-fulfilment of contracts on "settling-day," to assess the damages and fix the price at which settlements may be made.

SEC. 3. The Committee of Arrangement shall have charge of all matters pertaining to the account, other than those expressed in the preceding section, and shall have power to make additional rules and regulations therefor, reporting the same to the Governing Committee for approval. They shall also have power to change the date of the "settling-day," except for the existing account.

SEC. 4. Transactions may be made in "decimal lots" of stock less than one hundred shares, under the provisions of Section 1 of this Article.



**RULES AND REGULATIONS**  
**OF THE**  
**LONDON STOCK EXCHANGE**





## COMMITTEE.

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1. On the 20th day of March in every year, or if that day should be a Sunday or bank holiday, then on the following business day, a ballot by the members shall be held for the election of the Committee for General Purposes, appointment of a committee of thirty members who shall be called the "Committee for General Purposes," and shall hold office for twelve months from the 25th of March next following the date of their election, but shall be re-eligible. Notice of such ballot shall be publicly exhibited in the Stock Exchange during fourteen days previous to the same being held, and a further notice containing the names of the persons on the existing committee willing to serve again, and of all new candidates, their proposers and seconders, shall be publicly exhibited in like manner during three business days previously to such ballot being held. The members on the said committee retiring shall remain in office until the 25th of the same month of March in which their successors shall have been elected, and in case no election shall be made at any such ballot as aforesaid, the members retiring shall remain in office until the 25th day of March in the following year, or until a valid election shall have taken place under Clause 92. Four business days' notice previous to any ballot of intention to propose any person not already on the committee and eligible for re-election must be given to the Secretary of the committee in writing, signed by two members, and the ballot shall be by printed lists containing the names of the persons willing to serve again and of all persons so proposed, distinguishing the former from the latter. In case no valid election be made on the day hereinbefore appointed for that object, the committee may forthwith, or at any time thereafter prior to the next ordinary yearly ballot, cause a ballot to be held for such election, on a day to be fixed by the committee for that purpose, and in all respects, as lastly hereinbefore provided; and the committee to be appointed by such ballot shall remain in office until the 25th day of March then next following. Every ballot for the election of the Committee for General Purposes, or for supplying vacancies in the committee, shall be held at the Stock Exchange,

and, except as specially provided by these presents, shall be conducted in accordance with the existing practice and usage in reference to such elections. In case of dispute as to what such practice and usage has been in any particular, the committee shall from time to time determine the same by resolution.—*Deed of Settlement*, § xii. cl. 90.

2. No person shall be elected to the said Committee for General Purposes who shall not for the space of five years immediately preceding the day of election have been a member, and every person on ceasing to be a member shall *ipso facto* vacate his seat on the committee.—*Deed of Settlement*, § xii. cl. 91.

Every member is entitled to vote, although he may not have paid his subscription.

3. Any occasional vacancy in the said Committee for General Purposes shall be filled up by a ballot of members to be held for the purpose on a day to be fixed by the Committee for General Purposes, and of which seven days' previous notice shall be given by the same being publicly exhibited in the Stock Exchange. Similar notice of nomination shall be given as provided by Clause 90. The surviving or continuing members on the committee, notwithstanding any vacancy in their number, may act until the same shall be filled up.

Any person elected to supply an occasional vacancy in the said committee shall hold office for the residue of the year in which he shall be elected, and shall then retire with the other members of the said committee.—*Deed of Settlement*, § xii. cls. 92, 93.

4. The said Committee for General Purposes shall meet at such times as they may from time to time appoint, and shall determine their own quorum (the same to be not less than seven members actually present) and mode of procedure.

Until otherwise determined, the quorum of the said committee shall be seven members personally present.—*Deed of Settlement*, § xii. cls. 98, 99.

5. The said Committee for General Purposes shall regulate the transaction of business on the Stock Exchange, and may make rules and regulations not inconsistent with the provisions of these presents respecting the mode of conducting the ballot for the election of the committee, and

respecting the admission, expulsion, or suspension of members and their clerks, and the mode and conditions in and subject to which the business on the Stock Exchange shall be transacted, and the conduct of the persons transacting the same, and generally for the good order and government of the members of the Stock Exchange; and may from time to time amend, alter, or repeal such rules and regulations, or any of them; and may make any new, amended, or additional rules and regulations for the purposes aforesaid.—*Deed of Settlement*, § xii. cl. 95.

6. At their first ordinary meeting after the annual election, the committee shall elect, from among themselves, a Chairman and Deputy-chairman, who shall respectively hold office till the 25th of March next ensuing. In case either appointment shall become vacant, it shall be filled up as soon afterwards as possible. When the Chairman and Deputy-chairman are absent, the meeting shall appoint a Chairman. In all cases when, on a division, the votes are equal, the Chairman shall have a second or casting vote.

7. At the first meeting of the committee one of the members of the Stock Exchange shall be chosen Secretary, who shall hold his office during their pleasure; and three other members shall be appointed to act as Scrutineers at elections, who shall report the result of the ballot to the committee and to the Stock Exchange.

8. The ordinary meetings of the committee shall be held every Monday at one o'clock, commencing on the first Monday after each annual election. But a special meeting of the Committee may at any time be called by the Chairman or Deputy-chairman, or (in their absence, or in case of their refusal) by any three members of the committee. One hour's notice, at least, shall be posted in the Stock Exchange.

9. If a quorum be not assembled within a quarter of an hour after the time appointed for meeting, the Chairman or Deputy-chairman may adjourn such meeting.

10. The business of the committee shall be divided into two classes, viz.:

Routine,  
Special.

The first, to comprehend the reading of minutes for the purpose of confirmation or otherwise, the admission of members and clerks, fixing settling-days, etc.

The second, the investigation of claims and other matters relating to the interests of the members or of the public.

The printed notices of the meetings of the committee posted in the house shall contain the words on "Routine" or "Special" Business.

11. No resolution of the committee shall be valid, or put in force, until confirmed, unless it relate to the shutting of the house, the admission of members, the readmission of defaulters, the fixing of ordinary settling-days, or the granting or refusing of special settlements, and official quotations. In cases which do not admit of delay, two thirds of the committee present must concur in favor of the immediate confirmation of the resolution, and the urgency of the case must be stated on the minutes. In all cases brought under the consideration of the committee, their decision, when confirmed, is final, and shall be carried out forthwith by every member concerned.

12. Notice shall be given in writing of any alteration of, or addition to, the Rules, and a copy of such alteration of a rule, or proposed new rule, shall be sent to each member of the committee.

After the reading of the minutes, the consideration of any alteration of a rule, or proposed new rule, shall take precedence of all other business, except the readmission of defaulters and cases of urgency.

13. All communications to the committee shall be made in writing, and no anonymous letter shall be acted upon.

14. Members and their clerks shall attend the committee when required; and shall give such information as may be in their possession relative to any matter under investigation.

15. The committee may expel any of their own members from the committee who may be guilty of improper conduct. The resolution for expulsion must be carried by a majority.

ty of two thirds in a committee specially summoned for the purpose, and consisting of not less than twelve members, and must be confirmed by a majority of the committee at a subsequent meeting specially summoned.

16. The committee may expel or suspend any member of the Stock Exchange who may violate any of the rules or regulations, or fail to comply with any of the committee's decisions, or who may be guilty of dishonorable or disgraceful conduct. The resolution for expulsion or suspension must be carried by a majority of three fourths in a committee specially summoned for the purpose, and consisting of not less than twelve members, and must be confirmed by a majority of the committee at a subsequent meeting specially summoned.

Expulsion or suspension of members.

Special committee.

17. The Committee for General Purposes for the time being may, in their absolute discretion, and in such manner as they may think fit, notify, or cause to be notified, to the public that any member has been expelled, or has become a defaulter, or has been suspended, or has ceased to be a member, and the name of such member. No action or other proceeding shall under any circumstances be maintainable by the person referred to in such notification against any person publishing or circulating the same; and this rule shall operate as leave to any person to publish and circulate such notification and be pleadable accordingly.

Publication of names, etc.

18. The committee may dispense with the strict enforcement of any of the regulations; but such power shall only be exercised by a committee specially convened for that purpose, and consisting of not less than twelve members, three fourths of whom must concur in the resolution for such dispensation. The resolution must be confirmed by a majority of the committee at a subsequent meeting specially summoned.

Suspension of rules.

## ADMISSIONS, RE-ELECTIONS, AND RE-ADMISSIONS.

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19. Every member desirous of being re-elected shall, on or before  
Applications for re-election. the 4th of March in each year, address to the Secretary a letter, of the form inserted in the Appendix.

Each individual of a partnership is required to sign a separate letter.

20. The committee shall, on the first Monday in March, proceed to  
Admission and re-election. admit and re-elect such persons as they shall deem eligible to be members of the Stock Exchange, for one year, commencing on the 25th of March then instant, or last preceding the admission of such subscriber, at the amount fixed by the trustees and managers for such admission.

21. Every applicant for admission, previously to being balloted for,  
Sureties for new members. must be recommended by three members of not less than four years' standing, who have fulfilled all their engagements, and who are not indemnified. Each recommender must engage to pay five hundred pounds to the creditors of the applicant, in case the latter shall be declared a defaulter within four years from the date of his admission.

If the applicant has been a clerk in the Stock Exchange for four  
When two sureties required. years previously to his application, two recommenders only shall be required, who must each enter into a similar engagement for three hundred pounds.

No member shall be surety for more than three new members at the same time.

22. No foreigner shall be admissible unless he shall have been  
Foreigners. naturalized for a period of two years.

23. A notice of each application, with the names of the recom-  
Notice of application. menders, stating whether they are, or expect to be, indemnified, shall be posted in the Stock Exchange at least eight days before the applicant can be balloted for.

24. Members are required to have such personal knowledge of applicants whom they recommend, and of their past and present circumstances, as shall satisfy the committee as to their eligibility.

Personal knowledge of applicant by sureties.

25. Any recommender of a new member who at the time of such member's admission shall have avowed that he was not, and that he did not expect to be, indemnified, and who shall subsequently receive any indemnity, shall, in the event of the new member failing within the time of his liability, be compelled to pay to the creditors any sum so received, in addition to the amount for which he originally became surety.

Subsequent indemnification of sureties.

26. An applicant may be recommended by a firm, but not by two members of the same firm; nor by two members one of whom is authorized clerk to the other; nor by a member whose authorized clerk the applicant may be; nor by a member whose sureties are still liable.

Ineligibility of sureties.

27. If a member enter into partnership with, or become authorized clerk to, any one of his sureties, or if any one of his sureties cease to be a member during his liability, he shall find a new surety for such portion of the time as shall remain unexpired; and, until such substitute is provided, the committee will prohibit his entrance to the Stock Exchange.

New sureties, when required.

28. No applicant is admissible if he be engaged as principal or clerk in any business other than that of the Stock Exchange, or if his wife be engaged in business, or if he be a member of, or subscriber to, any other institution where dealings in stocks or shares are carried on; and if subsequently to his admission he shall render himself subject to either of those objections, he shall thereby cease to be a member.

Applicants engaged in other businesses.

29. \* No applicant for admission who has been a bankrupt, or has passed through the Insolvent Court, or has compounded with his creditors, shall be eligible unless he shall have paid 6s. 8d. in the pound; nor then, until two years after he shall

Bankrupts.

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\* This rule does not apply to the readmission of members of the Stock Exchange.

have obtained his official discharge, or fulfilled the conditions of his deed of composition, unless he shall have paid his debts in full; and no applicant having more than once been a bankrupt or insolvent, or compounded with his creditors, shall be eligible for admission until he shall have paid in full.

30. A member intending to object to the admission of an applicant or to the re-election of a member is required to communicate the grounds of his objection to the committee by letter previously to the ballot or re-election.

31. If any applicant for admission or re-election be rejected, he shall not be balloted for again before the 25th of March then next ensuing. Defaulters who have been rejected upon two ballots can only be readmitted by a majority of three fourths in a committee specially summoned, and consisting of not less than twelve members.

32. Any former member who, not having been a defaulter, bankrupt, or insolvent, shall have discontinued his subscription for one year must be recommended for re-election by two members, but without security. If he shall have discontinued his subscription for two years, he will be considered a new applicant, and must apply for admission in the usual way.

33. A notice of every defaulter, bankrupt, or insolvent applying for readmission shall, at the discretion of the committee, be posted (without recommenders) in the Stock Exchange at least twenty-one days, and the committee shall then take the application into consideration, upon the report of the sub-committee appointed according to Rule 164. If, however, the committee think fit, a defaulter may be readmitted without the above notice, upon a report of the sub-committee and a certificate signed by such a number of the creditors as may be satisfactory to the committee, that all liabilities have been *bona fide* discharged in full. In all such cases, after the defaulter has been readmitted by ballot it shall be decided by show of hands whether his name shall be posted in the Stock Exchange as having paid 20s. in the pound, or whether it shall be placed in one of the two classes mentioned in Rule 165.



34. The readmission of defaulters shall take precedence of all other  
Precedence of defaulters' readmission. business.

35. The chairman of the committee, in addition to any other  
Questions put to sureties. questions that may appear to be necessary, shall, to each of the recommenders of an applicant, put the following:—

Has the applicant ever been a bankrupt, or has he ever compounded with his creditors? and if so, within what time, and what amount of dividend has been paid?

Would you take his check for three thousand pounds in the ordinary way of business?

Do you consider he may be safely dealt with in securities for the account?

36. The Chairman shall require every new applicant to acknowledge his signature to the form of application, and shall  
Questions put to new applicants. ask such questions as may be deemed necessary.

## APPENDIX

### TO ADMISSIONS AND RE-ELECTIONS.

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1. Form of letter to be signed by persons desirous of becoming members of the Stock Exchange :

To the Secretary of the Committee for General Purposes.

SIR,—You will please to acquaint the Committee for General Purposes that I am desirous of being admitted a member of the Stock Exchange for the year commencing on the 25th of March, 18 , upon the terms of, and under and subject in all respects to, the Rules and Regulations of the Stock Exchange which now are, or hereafter may be, for the time being in force. I have read the Rules and Regulations of the Stock Exchange.

I have read the resolution at the back of the letter.

I am a British subject, and of age.

I am (state whether married or unmarried).

My residence is

My office is

My bankers are

I am not engaged in any business except such as is transacted at the Stock Exchange, nor am I clerk in any public or private establishment unconnected with the Stock Exchange, nor a member of, or subscriber to, any other institution in which dealings in Stocks or Shares are carried on.

I am, sir, yours faithfully,

We recommend Mr. as a fit person to be admitted a member of the Stock Exchange; and in case he shall be publicly declared a defaulter within four years from the date of his admission, we each of us hereby engage to pay to his creditors, upon application, the sum of five hundred pounds\* to be applied in discharge of the said defaulter's debts, in the Stock Exchange.

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\* The sureties must state opposite to their signatures whether they are, or are not, or expect to be, indemnified for the security they give, and must attend, together with the person recommended, at one o'clock of the day on which the ballot is to take place; and they are required to have such personal knowledge of the applicant and of his past and present circum-

The following rule is to be printed on the back of the letters of application :

26. If a member enter into partnership with, or become authorized clerk to, any one of his sureties, or if any one of his sureties cease to be a member during his liability, he shall find a new surety for such portion of the time as shall remain unexpired ; and until such substitute is provided, the committee will prohibit his entrance to the Stock Exchange.

The Secretary shall send to every member, on his admission, a letter to the following effect :

SIR,—I am directed to inform you that you are elected a member of the Stock Exchange for the year commencing on the 25th of March, 18 , upon the terms of, and under and subject in all respects to, the Rules and Regulations of the Stock Exchange which now are, or hereafter may be, for the time being in force. You will be admitted into the house on payment of the entrance-fee and subscription to Mr. W. F. PEROWNE, the Secretary to the Managers.

I am, sir, etc., etc.,

FRANCIS LEVIEN,

Sec. to the Committee for General Purposes.

2. Form of the letter to be signed by persons desirous of being re-elected members of the Stock Exchange :

APPLICATION FOR RE-ELECTION.

To the Secretary of the Committee for General Purposes.

SIR,—You will please to acquaint the Committee for General Purposes that I am desirous of being re-elected a member of the Stock Exchange for the year commencing on the 25th of March, 18 , upon the terms of, and under and subject in all respects to, the Rules and Regulations of the Stock Exchange which now are, or hereafter may be, for the time being in force.

My residence is

My bankers are

The under-named will continue to act as my clerk.

I am engaged in partnership with

I am not engaged in any business except such as is transacted at the Stock Exchange, nor am I clerk in any public or private establishment unconnected with the Stock Exchange, nor a member of, or subscriber to, any other institution in which dealings in Stocks or Shares are carried on.

I am, sir, your obedient servant,

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stances as may enable them to give a satisfactory account of the same to the committee.

*Rules and Regulations of the*

Name of Clerk.	Here state whether authorized or not to transact business; and if the party be a member, it is to be so stated.

The subscription is to be paid to Mr. W. F. PEROWNE, the Secretary to the Managers, in the committee-room within twenty-one days from the 25th March.

3. The Secretary shall furnish each applicant with a book of the Rules and Regulations, which must be carefully read by him previous to his admission.

The Secretary shall send to every member, on his re-election, a letter to the following effect:

SIR,—I am directed to inform you that you are elected a member of the Stock Exchange for the year commencing on the 25th of March, 18 , upon the terms of, and under and subject in all respects to, the Rules and Regulations of the Stock Exchange which now are, or hereafter may be, for the time being in force. You will please to pay your subscription to Mr. W. F. PEROWNE, the Secretary to the Managers.

I am, sir, etc., etc.,

FRANCIS LEVIEN,

Sec. to the Committee for General Purposes.

## PARTNERSHIPS.

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37. In every year, as soon as possible after the general election, a list of partnerships shall be made out by the Secretary. In case of a new or alteration in an old partnership, the same shall be communicated to the committee; and no partnership shall be considered as altered or dissolved until such communication be made.

All notices relative to partnerships must be signed by the parties, countersigned by the Secretary, and posted in the Stock Exchange.

38. The failure of a firm dissolves the partnership; and should the members of such firm, when readmitted, desire to renew the partnership, notice thereof must be given to the committee in the usual way.

39. No member of the Stock Exchange shall be allowed to enter into partnership with any person who is not a member: nor shall any member form a partnership during the liability of his recommenders, without their written consent; such consent to be communicated to the committee.

40. Members dealing generally together in any particular stock or shares, and participating in the result, shall be held responsible for the liabilities of each other, not only in the shares or stock in which they are jointly interested, but also in any other description of securities in which either of them may transact business, unless they forward a written notice to the Secretary, specifying the particular shares or stock in which they deal on joint account.

This rule to be applicable also to members allowing others to deal with their shares, stock, or capital, and participating in the result.

Form of notice to be countersigned by the Secretary, and posted in the Stock Exchange.

## (NOTICE.)

We, the undersigned, beg to inform the Committee for General  
 Form of Purposes that, from this day until further notice, we hold  
 notice. ourselves jointly responsible to the Stock Exchange for  
 all transactions entered into by either of us in

{ \_\_\_\_\_  
 { \_\_\_\_\_

We are, sir, etc.,

41. The committee will not allow members or their authorized  
 Brokers and dealers, clerks to act in the double capacity of Brokers and  
 and their clerks. dealers; nor will they sanction partnerships between  
 Partnership between Brokers and dealers.  
 Brokers and dealers. Brokers and dealers.

## CLERKS.

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42. No clerk shall be admitted without the permission of the committee, nor unless he be seventeen years of age.

No person who is not eligible for admission as a member can be admitted as a clerk, with the exception of persons under age who are ineligible as members on that account only.

No clerk shall be authorized to transact business until he has been two years in the Stock Exchange, and is twenty years of age.

No authorized clerk shall transact business as a dealer in any market other than that in which his employer is engaged.

43. A member desirous of obtaining the admission of a clerk, or of employing another member as his clerk, shall make application in writing to the committee, and state whether such clerk is authorized, or not authorized, to transact business.

When application is made for the admission of a clerk who has previously been engaged in business out of the Stock Exchange, the name and address of such person, together with the name of the member applying for his admission, shall be posted in the Stock Exchange eight days prior to the application being considered by the committee.

No clerk shall enter the Stock Exchange until his employer has received from the Secretary notice of his admission.

44. A member applying for the admission of an authorized clerk must first obtain the consent of his sureties in writing, if the term of their liability be not expired.

45. A member who may part with a clerk, or be desirous of withdrawing from an authorized clerk the permission to transact business on his account, shall give notice in writing to the Secretary, who shall forthwith communicate the same to the Stock Exchange in the usual manner.

46. A list of authorized clerks (distinguishing those who are also members) and the names of their employers shall be posted in the Stock Exchange, and the authority shall be considered to continue until revoked by letter to the committee.

47. A member authorizing a clerk to transact business shall not be held answerable for money borrowed by the clerk, without security, unless he shall have given special authority for that purpose.

48. A member employed as clerk, whether authorized or unauthorized, shall not make any bargain in his own name.

49. No clerk shall be allowed to apply for an allotment in loans or shares without the sanction of his employer, who shall be responsible for the payment of the deposit on the shares or stock so applied for.

50. Clerks of defaulters are excluded from the Stock Exchange. Clerks of deceased members may, by permission of two members of the committee, attend to adjust unsettled accounts.



## GENERAL RULES

APPLICABLE TO

### STOCK - EXCHANGE TRANSACTIONS.

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51. The Stock Exchange does not recognize in its dealings any other parties than its own members; every bargain, therefore, whether for account of the member effecting it or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the Stock Exchange.

52. No member shall attempt to enforce by law a claim arising out of Stock Exchange transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, of the creditors of the defaulter, or of the committee.

The committee have power to intervene in cases where the principal of a member shall attempt to enforce by law a claim which is not in accordance with the rules, regulations, and usages of the Stock Exchange, and will deal with such cases as the circumstances may require.

53. If a non-member shall make any complaint against a member, the committee shall in the first place consider whether the complaint is fitting for their adjudication; and in the event of the committee deciding in the affirmative, the non-member shall, previously to the case being heard by the committee, sign a consent in writing as follows:

*To the Committee for General Purposes of the Stock Exchange,  
London,*

In the Matter of a Complaint between \_\_\_\_\_ and \_\_\_\_\_

GENTLEMEN,—I do hereby consent to refer this matter to you, and I undertake to be bound by the said reference, and to abide by and forthwith to carry into effect your award, resolution, or decision in this matter, in the same manner as if I were a member of the Stock Exchange; and I

further undertake not to institute, prosecute, or cause or procure to be instituted or prosecuted, or take any part in, proceedings, either civil or criminal, in respect of the case submitted. And I consent that the committee may proceed in accordance with their ordinary rules of procedure, and I undertake to be bound by the same. Also, that the committee may proceed *ex parte* after notice, and that it shall be no objection that the members of the committee present vary during the inquiry, or that any of them may not have heard the whole of the evidence; and any award or resolution of the committee, signed by the Chairman for the time being, shall be conclusive that the same was duly made or passed, and that the reference was conducted in accordance with the practice of the committee. And I hereby consent that such award or resolution shall be deemed to be an award under the Common-law Procedure Act, 1854, and be enforceable accordingly, and that the same may be made a rule of the Court of Queen's Bench or of either of the other superior courts of common-law.

I remain,

Gentlemen,

54. If a member shall do a private bargain, either for money or time, with an individual member of a firm in the Stock Exchange, such bargain being concealed from the firm, both members shall be expelled.

Private dealing with individuals of a firm prohibited.

55. If any member or authorized clerk shall do a bargain, either for money or time, with an authorized or unauthorized clerk, for account of such clerk, they shall be liable to expulsion.

Bargains with money or for clerks.

56. The committee particularly caution members against transacting speculative business for clerks in public or private establishments, without the knowledge of their employers.

Speculative business for clerks prohibited.

Members disregarding this caution are liable to be dealt with in such manner as the committee may deem advisable.

Penalty.

57. No application which has for its object to annul any bargain in the Stock Exchange shall be entertained by the committee, unless upon a specific allegation of fraud or wilful misrepresentation.

Inviolability of bargains.

58. The committee will not recognize any dealing in letters of allotment, either of loans, or shares in new companies.

Dealings in letters of allotment.

59. A member applying for Shares or Stock of loans or public companies, and neglecting to pay the deposit on the same, shall be considered to have violated a contract, and shall be compelled to fulfil his engagement.

Payment of deposits by allottees.

60. The committee will not recognize new Bonds, Stock, or other Securities issued by any foreign government that has violated the conditions of any previous public loan raised in this country, unless it shall appear to the committee that a settlement of existing claims has been assented to by the general body of bondholders.

New bonds of foreign governments violating conditions of previous public loans.

Companies issuing such Securities will be liable to be excluded from the official list.

61. The committee will not, after the restoration of peace, recognize, or allow the quotation of, any loan raised by a power while at war with Great Britain.

Loans raised by powers while at war with Great Britain.

62. No member shall enter into bargains in prospective dividends on Shares or Stock of railway or other companies.

Bargains in dividends forbidden.

63. All disputes between members not affecting the general interests of the Stock Exchange shall be referred to arbitration; and the committee will not take into consideration such disputes, unless arbitrators cannot be found or are unable to come to a decision.

Arbitration.

64. No member shall be obliged to take a reference for payment to a non-member; nor shall he be obliged to pay a non-member for Securities bought in the Stock Exchange.

Reference for payment to non-members not sanctioned.

65. Checks must be passed through the Clearing-house, unless the drawer consent to their being otherwise presented. But if a member require bank-notes in payment for Securities sold, without having made such stipulation at the time of making the bargain, he must give notice to that effect before half-past eleven o'clock on the day of delivery, and payment shall be made upon delivery of the Securities or the bank receipt.

Checks for clearing.

Demand for bank-notes.

66. A seller, having transferred or delivered Stock or other Securities, has a right to demand payment from the member who passed him the ticket; and in case the seller apply to the issuer of the ticket, and fail to obtain payment, or receive a check which is dishonored, the member from whom he received the ticket shall make immediate payment.

67. A seller may require payment of the difference between the price marked on the ticket and the making-up price of the day on which the ticket is tendered; but if such making-up price be above the price of sale, he shall only be entitled to claim the difference up to the price of sale.

68. In cases of loans, the lender is not entitled to place beyond his control Shares or Stock received as security for money advanced; and he may, after reasonable notice, and upon payment of the principal together with interest up to the time for which the loan was originally made, be required to return the identical Bonds, or to retransfer the Shares or Stock given as security for such loan. But this liability does not apply to a member who has taken in Shares or Stock upon continuation.

All continuations shall be effected at the making-up price, or at the then existing market price.

69. Buying-in or selling-out must be effected publicly by the Secretary to the Committee for General Purposes, or by the clerks of the house in their respective markets, who shall trace the transaction to the responsible party, and claim the difference thereon.

70. Bonds, Shares, or other Securities shall not be bought in while they are known to be out of the control of the seller for the payment of calls, or the receipt of interest, dividends, or bonus; and the committee, on being applied to, will fix a day on which they may be bought in.

71. In the settlement of all bargains, dividends are to be accounted for at the net amount receivable after deduction of income-tax.

In the case of dividends payable only abroad, the Sec-

retary to the Share and Loan Department shall fix a price for the  
Fixing price of foreign coupons. coupons in sterling money, which shall be posted in the  
 Stock Exchange, and at which the dividends shall be accounted for.

Current coupon. Securities to bearer are not deliverable on the settling-day without the current coupon.

When deliverable ex coupon. Securities to bearer, with coupon payable on the settling-day, shall be delivered ex coupon.

When the dividend is payable after the settling-day, outstanding  
When dividend payable after settling-day. bargains in Securities to bearer shall be settled with the  
 current coupon, otherwise the buyer shall have the right to demand the market value of the coupon, which, in case of dispute, shall be fixed by the Secretary to the Share and Loan Department.

72. All optional bargains for the settlement shall be declared at a  
Options. quarter before three o'clock two days before the settling-day.

73. The hours of business in the Stock Exchange are from eleven  
Hours of business. until three o'clock. On Saturdays business will close at one o'clock.

When the ticket-day is fixed for a Saturday, the house will be  
Ticket-day on Saturdays. kept open until THREE o'clock, for the purpose of the settlement only, the regulations for which shall be the same as on ordinary ticket-days.

The Stock Exchange will be closed on the following days,  
Holidays. viz. : 1st January, Easter-Monday, 1st May, Whit-Monday, the first Monday in August, 1st November, 26th December, unless specially ordered otherwise by the committee.

When either the 1st January, 1st May, 1st November, or 26th December falls on a Sunday, the house will be closed on the day following.

Bargains to be checked. N.B. The committee strongly recommend that all bargains be checked on the following day.

## RULES

APPLICABLE TO

### ENGLISH AND INDIA STOCKS, ETC.

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74. All bargains, when no time is specified, shall be considered as  
 Bargains when no time specified. made for the existing account.

75. The committee will not recognize any bargain for a future ac-  
 Dealing for future ac- counts. count if it shall have been effected more than eight days  
 previously to the close of the pending account.

76. An offer to buy or sell a sum of Stock at a price named is  
 Offers to buy or sell. binding as to any part thereof; and an offer to buy or  
 sell Stock when no amount is named is binding to the  
 amount of £1000 Stock.

77. If the seller of Stock shall not receive from the purchaser a  
 Transfer- fees. transfer-ticket by ten minutes before one o'clock, he may  
 demand two shillings and sixpence for each transfer-fee,  
 which may be paid for the actual transfer of such Stock. On a set-  
 tling-day, if the transfer-ticket is not delivered by a quarter before  
 one o'clock, the seller may claim of the purchaser two shillings and  
 sixpence for every £1000 Stock; and if he shall not receive a trans-  
 fer-ticket before half-past one o'clock on the day it was contracted to  
 deliver the said Stock, he may sell out the same, and claim  
 Selling-out. of the person who held the ticket at half-past one o'clock  
 any loss or charge incurred. On Saturdays Stock may be sold out at  
 a quarter to one o'clock.

78. Stock bought for a specified day, and not then delivered, may  
 Buying-in. be bought in on the following day at eleven o'clock; and  
 the member causing the default shall pay any loss in-

curred, and also one eighth per cent. for the non-delivery of the Stock.  
 Fine. This fine shall attach to all Stock not delivered on the day  
 for which it was bought, whether it shall have been bought  
 in or not.

79. Transfer receipts for stock bought for a specified day must be  
 Time for de- delivered by a quarter before four o'clock, or by half-past  
 livery of trans- one o'clock on Saturdays.  
 fer receipts.

Omnium or scrip not paid in full must be delivered before two  
 Omnium. o'clock, or by one o'clock on Saturdays.

80. When Stock is borrowed without any stipulation as to its re-  
 Borrowed turn, the borrower or lender may be called upon to deliver  
 stock. or take it on the following day, whether a regular transfer-  
 day or not.

81. In cases of loans on the deposit of Stock, when the striking of the  
 Loans on balances for dividend takes place before repayment of the  
 stock. loan, the lender shall allow the dividend, deducting interest  
 Dividend thereon till the day of payment of, and at the same rate  
 allowed. as, the loan.

82. Purchasers of Bank or East India Company's Stock may re-  
 Limit as to quire, at the seller's expense, as many transfers as there  
 the number are even thousand pounds stock in the sum bargained for.  
 of transfers.

83. The clerk of the house shall fix the making-up prices, by  
 Fixing taking the average price between eleven and one o'clock  
 making-up on each of the two days preceding the account, and be-  
 prices. tween eleven and a quarter before one o'clock on the settling-day;  
 and no making-up shall be binding unless at such fixed prices.

## RULES

APPLICABLE TO

### SECURITIES OF COMPANIES DELIVERABLE BY DEED OF TRANSFER.

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84. Bargains in Shares or Stock, when no time is specified, and bargains made before twelve o'clock on ticket-days, shall be considered to be made for the existing account.

**Bargains when no time is specified.**

85. The committee will not recognize any bargain in Shares or Stock effected for a period beyond the ensuing two accounts.

**Dealing for future accounts.**

86. An offer to buy or sell an amount of Shares or Stock at a price named is binding as to any part thereof, that may be a marketable quantity; and an offer to buy or sell Shares or Stock when no amount is named is binding to the amount of ten shares, if in value under £500, or a number not exceeding in value that sum, or to the amount of £1000 Stock.

**Offers to buy or sell.**

87. The seller of Shares or Stock is responsible for the genuineness and regularity of all documents delivered, and for such dividends as may be received, until reasonable time has been allowed to the transferee to execute and duly lodge such documents for verification and registration. When an official certificate of registration of such Shares or Stock has been issued, the committee will not (unless bad faith is alleged against the seller) take cognizance of any subsequent dispute as to title, until the legal issue has been decided, the reasonable expenses of which legal proceedings shall be borne by the seller.

**Responsibility of seller for regularity of documents and for dividends.**

**Disputed title after registration.**



88. The committee will not (except under special circumstances) interfere in any question arising from the delivery of Shares, Stock, Bonds, or Debentures by transfer in blank.

89. The buyer who takes up Securities deliverable by deed of transfer shall, before twelve o'clock on the ticket-day, issue a ticket with his own name as payer of the purchase-money, which ticket shall contain the amount and denomination of the Stock or Security to be transferred; the name, address, and description of the transferee in full; the price, the date, and the name of the member to whom the ticket is issued. Each intermediate seller, in succession, to whom such ticket shall be passed shall endorse thereon the name of his seller.

All tickets representing Stock or Shares which, at the time, are subject to arrangement by the Settlement Department shall be passed through the accounts at the making-up price of the day before the ticket-day, and the Stock or Shares paid for at that price; but the consideration money in the deed must be at the price on the ticket.

A member receiving a ticket from the issuer after twelve o'clock on the ticket-day shall note the same on the back of the ticket; it is also required that the member who first receives a ticket

After . . . . one o'clock,  
After half-past one o'clock,  
After . . . . two o'clock, or  
After half-past two o'clock,

shall draw a line noting such times; and members receiving tickets after three o'clock, or at any time on any subsequent day, shall mark the exact time at which they are received.

Members omitting to note the times thus fixed may become liable for losses occasioned by selling out in case undue delay is proved under the provisions of Rule 98.

A member splitting a ticket shall pay any increased expense caused by such splitting, and shall retain the original ticket. Split tickets must bear the name of the issuer of the original ticket.

A member failing to keep the original ticket will be required to trace it in case of selling out.

On ticket-days the passing of tickets shall commence at ten o'clock.

Time for leaving  
tickets at offices. Tickets may be left at the office of the seller up to half-past one o'clock on ticket-days.

Tickets may be issued and passed on the day before the ticket-day, but the buying-in upon tickets so issued shall not be allowed until the eleventh day after the ticket-day.

90. When Shares have been converted into Consolidated Stock and Shares converted into consolidated stock. are so quoted in the official list, buyers are required to pass tickets for Stock, and not for Shares.

91. A member not refusing an antedated ticket, when tendered as Antedated or undated tickets. such, takes it with all its liabilities; but if it be passed as an ordinary ticket, the liabilities remain with the member putting such ticket again into circulation; and any member holding an undated ticket shall not be liable for any loss arising from the Shares or Stock having been bought in, unless such ticket has been seven days in his possession.

92. A member who makes an alteration in, or improperly detains, a ticket shall make good any loss that may occur Alteration or detention of tickets. thereby.

93. The deliverer shall cause the Shares or Stock to be transferred Prices marked on ticket. at the price marked upon the ticket; but no member shall be compelled to take a ticket at a price not quoted in the official list during the account, unless the bargain represented by such ticket shall have been made within the two preceding accounts.

94. The deliverer may, previously to delivery, pay any call made on registered Shares, although not due, and claim the amount Pending calls. of the issuer of the ticket.

95. The buyer of Shares or Stock shall pay the *ad valorem* duty Payment of stamps. and registration fee, and shall state on the ticket the amounts in which he may desire to have the Shares or Stock transferred, provided no such amounts require a higher stamp than £50.

In cases of loans, the borrower shall pay the nominal-consideration

Stamps on stamp of ten shillings, the registration fees, and the mortgage stamp.  
loans.

96. The buyer shall, in the event of his ticket being split, pay for any portion of Shares or Stock which may be presented, provided the number be not less than ten Shares or the value less than £200.

97. The buyer of Shares or Stock may refuse to pay for a transfer deed unaccompanied by coupons or certificates, unless it be officially certified thereon that the coupons or certificates are at the office of the company. But if the transfer deed be perfect in all other respects, the Shares or Stock must not be bought in until reasonable time has been allowed to the seller to obtain the verification required. If the seller have a larger coupon than the amount of Stock conveyed, or only one coupon representing Stock conveyed by two or more transfer deeds, the coupon may be deposited with the Secretary of the Share and Loan Department of the Stock Exchange, who shall forward it to the office of the company, and certify to that effect on the transfer deeds, which shall then be a valid delivery. No person is to look to the Managers or Committee of the Stock Exchange as being liable for the due or accurate performance of those duties, the managers and committee holding themselves, and being held, entirely irresponsible in respect of the execution, or of any misexecution or non-execution, of the duties in question.

98. The deliverer of Shares or Stock who shall not receive a ticket by half-past two o'clock on the ticket-day may sell out such Securities up to three o'clock. If a ticket shall not have been regularly issued before twelve o'clock, the issuer thereof shall be responsible for any loss occasioned by such selling-out. Should, however, a ticket have been regularly put into circulation, the holder thereof at two o'clock shall be responsible for any selling-out on the ticket-day. If the selling-out take place on the next day, the holder of the ticket at three o'clock on the ticket-day shall be liable—*unless such ticket was in the Settlement Department at three o'clock, in which case the holder of such ticket at four o'clock shall be liable.*

Settlement Department. In case of selling out on any subsequent day, the holder of the ticket at three o'clock on the previous day, or at one o'clock on Satur-

days, shall be liable, unless he can prove undue delay in passing the ticket.

Should the deliverer allow two clear days to elapse without availing himself of his right to sell out, his buyer shall be released from all loss in cases where the ticket has not been passed in consequence of the public declaration of any member as a defaulter. If a seller does not deliver Shares or Stock within thirteen clear days, the intermediate buyer from whom he received the ticket shall be released, and the issuer thereof shall alone remain responsible for the payment of the purchase-money.

99. When Shares or Stock are sold out, if a ticket be not given within half an hour after the time of sale, the transfer may be made into the name of the buyer.

100. If Shares or Stock are not delivered within ten days, the issuer of the ticket may buy in the same against the seller at or after twelve o'clock on the eleventh day after the date of the ticket, or on any subsequent day.

One hour's public notice of such buying-in must be posted in the Stock Exchange, and the purchase must be made or attempted within half an hour after the expiration of the time fixed. The name into which the Shares or Stock are to be transferred must be stated in the order to buy in. The loss occasioned by such buying-in shall be borne by the ultimate seller, unless he can prove that there has been undue delay in the passing of the ticket on the part of any member, who shall in that case be liable.

Shares or Stock thus bought in and not delivered by one o'clock on the following day, or by twelve o'clock on Saturdays, may be repurchased for immediate delivery without further notice, and any loss shall be paid by the member causing such repurchase.

101. The issuer of a ticket who shall allow thirteen clear days from the date of his ticket to elapse without buying in, or attempting to buy in, Shares or Stock, shall release his seller from all liability in respect of the non-delivery of the securities, unless he shall have waived his right to buy in at the request or with the consent of his seller; and the holder of the ticket shall alone remain responsible to such issuer for the delivery of the securities.

102. The buyer is entitled to new Shares or Stock issued in right of old, provided that, within reasonable time, he specially claim the same, in writing, from the seller. Claims should be entered as bargains, and, as such, be checked in the usual manner.

When practicable, claims are required to be settled by letters of renunciation, but if not practicable, and there be sufficient time for registration, the seller may, after due notice, require the buyer to complete the bargain in old Shares or Stock.

If the new Shares or Stock cannot be obtained by letters of renunciation or by the transfer of the old, the committee will fix a price at which the same shall be temporarily settled, and which amount may be deducted by the buyer from the purchase-money of the old Shares or Stock, until the special settlement.

The committee will not entertain any dispute relating to unchecked claims, unless brought before them within ten days after the special settling-day.

103. On the day before the ticket-day, and on the ticket-day, the Clerk of the house shall, at twelve o'clock, fix the making-up prices by taking the then actual market prices; and no making-up shall be binding, unless at such fixed prices. In case of dispute as to the making-up price, or of any omission in fixing the same, the Clerk of the house shall act upon the decision of two members of the committee.

104. On ticket-days all unsettled bargains shall be brought down and temporarily adjusted at the making-up price of the day, the difference thereon being paid on each subsequent settling-day, until the closing of the transaction.

105. No member shall be required to pay for Shares or Stock presented after half-past two o'clock, or after one o'clock on Saturdays.

## RULES

APPLICABLE TO

### SECURITIES TO BEARER.

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106. Bargains, when no time is specified, shall be considered as  
 Bargains, when no time specified. made for the existing account; but those made on a settling-day shall, unless otherwise expressed, be for the ensuing account.

107. The committee will not recognize any bargain effected for a  
 Dealing for future accounts. period beyond the end of the ensuing two accounts.

108. An offer to buy or sell a sum of Stock at a price named is  
 Offers to buy or sell. binding as to any part thereof, not less than the under-mentioned sums, and divisible by the same—viz.: £1000 Stock or Scrip; Fs. 750 French Rentes; 10 Shares.

109. No member shall be required to accept the delivery of a cer-  
 American bonds and shares, amount deliverable. tificate of American Shares of a larger amount than 10 Shares of \$100 each nominal capital, or 20 Shares of \$50 each, nor an American Bond of a larger amount than \$1000, except upon special contract.

110. The seller of Securities for a particular day which the buyer  
 Selling out. is not prepared to pay for by half-past two o'clock on that day (or half-past twelve o'clock on Saturdays) may sell out the same, and claim of the buyer any loss incurred.

111. On the ticket-day, between ten and three o'clock, tickets shall  
 Tickets shall be passed. be passed without any price thereon, and the accounts made up therewith are to be settled at the making-up price of the day.

Tickets must bear distinctive numbers and be for the following

Tickets must  
bear numbers. amounts, viz. :

Amounts £1000 stock, or multiples of £1000 up to £5000.

deliverable. £1000 Italian stock, or multiples thereof up to £5000.

Also £800, or multiples thereof up to £4800.

\$5000 American stocks, or multiples thereof up to \$25,000.

Fs. 1500 French 3 per cent. rentes, or multiples thereof up to fs. 6000.

10 shares, or multiples thereof up to 100.

Tickets for £500 stock may be passed for bargains or balances of that amount.

Smaller amounts must be settled without tickets.

Tickets shall not be issued later than two o'clock on the ticket-day.

Tickets shall not be split, except in the Settlement Department in cases where the sub-committee appointed to control that department may consider it necessary.

Every member is required to endorse on the ticket the name of the member to whom it is passed.

Tickets may be left at the office of the seller up to half-past two o'clock on ticket-days.

On the settling-day, and on the day after the settling-day, the delivery of Securities shall commence at ten o'clock.

Sellers shall accept tickets ; and if they elect to settle with their immediate buyers under the provisions of Rule 66, they shall deliver their Securities before half-past twelve o'clock.

The holder of tickets may deliver Securities up to half-past one o'clock on settling-days.

A member electing to take Securities from his immediate seller must give notice thereof before twelve o'clock on the ticket-day, in which case he shall be required to pay up to two o'clock on the settling-day. Members neglecting to give such notice shall be required to pay up to half-past two o'clock.

Buyers shall pay for such portion of Securities as may be delivered

Portions to be paid for. within the prescribed times.

112. A member shall be required to pay for Securities presented until half-past two o'clock on any day other than settling-days. On Saturdays he shall not be required to pay for Securities after one o'clock.

Time for re-  
quiring pay-  
ment.

113. Securities bought for any period, except the settling-day, which  
 Buying-in. shall not be delivered by half-past two o'clock or by half-past twelve o'clock on Saturdays, may be bought in on the same or any subsequent day, and any loss occasioned by such repurchase shall be borne by the seller.

But Securities bought for the settling-day, and not delivered by half-past two o'clock, may be bought in on the following or any subsequent day, after one hour's notice to be posted in the  
 Notice. foreign market, announcing the intended purchase. The buying-in not to take place before two o'clock, nor before half-past twelve o'clock on Saturdays, in which case the loss shall be borne by the member who shall not have delivered the shares or stock by half-past two o'clock on the previous day, or by one o'clock on Saturdays.

Stock thus bought in, and not delivered by one o'clock on the following day, or by twelve o'clock on Saturdays, may be re-  
 Non-delivery of stock bought in. purchased for immediate delivery without further notice, and any loss shall be paid by the members causing such repurchase.

A member neglecting to take the numbers of Securities delivered  
 Neglecting to take numbers. after time shall be required to trace out the member responsible for the loss.

114. A member who shall allow two clear days to elapse without  
 Limit of time for buying in. availing himself of his right to buy in, or without attempting to buy in, Securities releases the seller from any loss  
 Release of intermediates. in consequence of the public declaration of any member as a defaulter, unless he shall have waived such right at the request or with the consent of the seller.

115. The Clerk of the house shall, at twelve o'clock on each of the  
 Making-up prices. two days preceding each settling, fix the making-up prices of all Securities by taking the then actual market prices; and no making-up shall be binding unless at such fixed prices.

116. On settling-days all unsettled bargains shall be brought down  
 Making-up prices on settling-day. and temporarily adjusted at prices to be fixed by the Clerk of the house at half-past two o'clock, and the differences shall be paid in the usual manner.

117. Bargains in exchequer bills are for bills not filled up to  
 Exchequer bills. order.



118. Bargains in French rentes, unless otherwise specified, shall be settled in certificates to bearer, and at a fixed exchange of 25 fs. per pound sterling.

French  
rentes.

119. Foreign coupons sold at the exchange of the day, and not paid, are returnable with all reasonable expenses.

Foreign coupons,  
when returnable.

120. The buyer of bonds or other Securities subject to periodical drawing shall not be entitled to claim delivery thereof previous to the day for which they were bought.

Drawn bonds.

Bargains must be settled in Securities which have not been officially notified as drawn. In case of the erroneous delivery of any drawn Securities, the buyer (on receipt of undrawn Securities, and on allowance being made for any drawing or dividend of which he may have lost the benefit) shall deliver such Securities back to the person who held them at the time of the official notification of the drawing, or shall pay to him any proceeds received from such drawing, provided the said Securities or the proceeds thereof be traced to, and remain in the possession and under the control of, such buyer, all intermediate members being released from liability.

No claim in respect of the erroneous delivery of drawn Securities will be entertained by the committee, unless made within nine calendar months.

121. The buyer is entitled to new Securities issued in right of old, provided that within reasonable time he specially claim the same in writing from the seller, who may, after due notice, require the buyer to complete the bargain in old Securities. Claims should be entered as bargains, and as such be checked in the usual manner.

Buyer entitled  
to new Se-  
curities.

The committee will fix a price for the new Securities, which may be deducted by the buyer from the purchase-money of the old Securities until the special settlement.

The committee will not entertain any dispute relating to unchecked claims unless brought before them within ten days after the special settling-day.

122. The deliverer is responsible for the genuineness of Securities delivered ; and in case of his death, failure, or retirement from the Stock Exchange, such responsibility shall attach to each member in succession through whose hands the ticket for such Securities shall have passed.

123. Every bond or scrip share is to be considered perfect unless it be much torn or damaged, or a material part of the wording be obliterated. The committee will not take cognizance of any complaint in respect of bonds or shares alleged to have been delivered in a damaged condition, or deficient in or with irregular coupons, should such bonds or shares be detained by the buyer more than eight days after the delivery, unless it can be proved that the member passing them was aware of their being imperfect.

124. Bonds and debentures of railways in Great Britain, Ireland, and the East Indies shall be dealt in so that the accrued interest up to the day for which the bargain was done be paid by the buyer ; but bargains in bonds and debentures of colonial and foreign railways shall include the accrued interest in the price.

## SPECIAL SETTling-DAYS AND OFFICIAL QUOTATION OF NEW LOANS, SHARES, AND STOCKS.

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125. Bargains in the scrip of a new loan or the shares of a new company are contingent on the appointment of a special settling-day.

126. The committee will appoint a special settling-day for transactions in the scrip of a new loan, provided the requisite documents are in due order, that the issue is not in contravention of Rules 60 and 61, and that no allegation of fraud is substantiated.

The application for a special settling-day for bargains in foreign, colonial, or other loans must be laid before the Secretary of the Share and Loan Department, who shall give three clear days' public notice previously to its being considered by the committee.

The application must be accompanied by the prospectus, by notarial copies, or translations, or other satisfactory evidence of the powers under which the loan is contracted, and by a certificate verified by the statutory declaration of the contractors or agents of the amount allotted to the public, that the scrip or bonds are ready for delivery and are in reasonable amounts.

The committee will order the quotation of the scrip and bonds of a foreign, colonial, or other loan, the dividends of which are payable in this country, provided such loan has been publicly negotiated by tender, contract, or otherwise; and provided the bonds specify the amount and conditions of the loan, the powers under which it has been contracted, and the numbers and denominations of the bonds issued, and bear the autographic signature of the contractor or properly authorized agent.

Bonds will not be admitted to quotation until they have been approved by the committee.

Bonds, the dividends of which are payable abroad, may be quoted upon satisfactory proof of the amount created, and of the official quotation in the country where issued.

Quotation of  
bonds, with  
dividend pay-  
able abroad.

127. Bargains in foreign loans, which are officially quoted in the country to which they belong, shall be for the ordinary settlements.

Settling-day  
in foreign or  
colonial  
loans.

128. The committee will appoint a special settling-day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery; and that no impediment exists to the settlement of the account.

Special set-  
tling-days.

129. The Secretary to the Share and Loan Department shall give one week's notice to the Stock Exchange of any application for a special settling-day for transactions in the shares of a new company, previously to such application being submitted to the committee, and shall require the production of the following documents, viz.:

Documents  
required.

The prospectus, the act of Parliament, the articles of association, or a certificate that the company is constituted upon the cost-book system, under the Stannary Laws.

The original applications for shares; the allotment book, signed by the Chairman and Secretary to the company; and a certificate, verified by the statutory declaration of the Chairman and the Secretary, stating the number of shares applied for and unconditionally allotted to the public, the amount of deposits paid thereon, and that such deposits are absolutely free from any lien.

The banker's pass-book, and a certificate from the banker stating the amount of deposits received.

130. The committee will order the quotation of a new company in the official list, provided that the company is of *bona fide* character, and of sufficient magnitude and importance; that the requirements of Rule 129 have been complied with; and that the prospectus has been publicly advertised, and agrees substantially with the act of Parliament, or the articles of association, and, in the case of limited companies, contains the memoran-

Quotations of  
shares of a  
new com-  
pany.

dum of association ; that it provides for the issue of not less than one half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed, and sets forth the arrangements for raising the capital—whether by shares fully or partly paid up, with the amounts of each respectively—and also states the amount paid, or to be paid, in money or otherwise to concessionnaires, owners of property, or others, on the formation of the company, or to contractors for works to be executed ; and the number of shares, if any, proposed to be conditionally allotted.

That two thirds of the whole nominal capital proposed to be issued have been applied for and unconditionally allotted to the public (shares reserved or granted in lieu of money payments to concessionnaires, owners of property, or others, not being considered to form part of such public allotment) ; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares ; and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking, and be able to furnish the committee with all particulars they may require.

In cases where fully paid shares have been granted in lieu of money payments, an official certificate will be required that the contract providing for the issue of such shares has been filed with the Registrar of Joint-stock Companies, as prescribed by the 25th section of the Companies' Amendment Act, 1867.

Foreign companies partly subscribed for and allotted in this country shall not, unless under special circumstances, be allowed a quotation in the official list until they have been officially quoted in the country to which they belong.

131. A company issuing, or promising to issue, new shares within twelve months after the first settling-day appointed by the committee, unless under special circumstances, shall be liable to exclusion from the official list.

132. The committee particularly caution Brokers against giving the sanction of their names to the bringing-out of any company without due inquiry as to the *bona fides* of its objects, the character of its promoters, directors, and concessionnaires, and of the other persons connected therewith. Members disregarding this caution are liable to be dealt with in such manner as the case may require.

## ORDINARY SETTling-DAYS AND OFFICIAL QUOTATION OF PRICES.

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133. The committee shall fix the settling-day for English stock at least eight days previous to the settlement of the pending account; and at their first meeting in each month they shall fix the ticket-days and settling-days for foreign stock, shares, etc., for the succeeding month.

The Secretary shall give notice of the days thus appointed.

134. The settling-day in English omnium and scrip shall be two days prior to the respective days of payment of each of the several instalments, unless the payment falls on a Tuesday, in which case the settling-day shall be on the previous Monday.

In case the payment of an instalment on foreign or other scrip falls on a settling-day, the settlement of such scrip shall take place the day previous to the payment.

135. A list of prices of English and foreign stocks, shares, and other securities permitted to be quoted shall be published under the authority of the committee; and no list shall be published and sold by a member without the sanction of the committee.

136. The prices of all bargains may be quoted in the official list, but no price shall be inserted unless the bargain shall have been made in the Stock Exchange between members at the market price; nor on the authority of one of them, if he refuse, when required by a member of the committee, to give up the name of the member with whom he has dealt.

137. Bargains at special prices, by reason of their exceptional amounts, may only be quoted with distinguishing marks.

138. Bargains in English stock for the next transfer-day, or in foreign or other stocks for the following day, may be marked in the official list of money prices.

Quotation of money prices, etc. Of stock during shutting. Bargains in all stocks made during the shutting, for the opening, may be quoted in the official list.

Of bonds with over-due coupons. Bargains in foreign bonds may be quoted in the official list, with or without over-due coupons.

Omnium. Omnium may be quoted for the issue of the receipts, for money, and for the next succeeding payment.

139. All dealings in English stock (except bank stock) and in India 4 and 5 per cents., for any day subsequent to the striking of the balances of such stocks for dividend, shall be ex dividend, and quoted accordingly.

140. Bargains in transferable shares or stock shall be quoted ex interest from the beginning of the account in which the interest may become payable; and ex dividend from the beginning of the account following that in which the dividend may have been declared, provided the dividend be made payable to the holders then registered; but in case of a subsequent shutting of a company's books for payment of the dividend, then, from the beginning of the account following that in which such shutting occurs.

Dividends on securities to bearer. Bargains in securities to bearer shall be quoted ex dividend on the day when the dividend is payable.

Shares in foreign railways shall, when practicable, be quoted ex dividend or ex interest at a period in accordance with the practice of foreign bourses.

141. Bargains should be quoted in the order in which they are made; but the Clerk of the house may, with the concurrence of a member of the committee, quote omitted bargains, if notified before one o'clock, in the order in which they occurred, upon a written application from the buyer and the seller stating the amount, the time when, and the price at which such bargains were made; and such application shall be filed and laid before the committee at their next meeting. The above regulation applies likewise to all bargains done between one and three o'clock.

142. A price inserted in the official list shall not be expunged without the authority of the Chairman, Deputy-chairman, or two members of the committee.

Prices not to be expunged without authority.

## FAILURES.

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143. A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the Chairman, Deputy-chairman, or any two members of the committee.

**Public declaration of defaulters.**

144. A member declared a defaulter in the Stock Exchange, or a member who may become bankrupt or insolvent, although he may not be at the same time a defaulter in the Stock Exchange, ceases to be a member.

**Defaulters, bankrupts, etc., cease to be members.**

145. When a member shall give private intimation to his creditors of his inability to fulfil his engagements, the creditors shall not make any compromise with such defaulter, but shall immediately communicate with the Chairman, Deputy-chairman, or two members of the committee, in order that the member in default may be immediately declared; and in case the committee shall obtain knowledge of any private failure, the name of the defaulter shall be publicly declared.

**Private failures.**

146. A member conniving at a private failure, by accepting less than the full amount of his debt, shall be liable to refund any money or securities received from such defaulter, provided he shall be publicly declared within two years from the time of such compromise, the property so refunded being applied to liquidate the claims of the subsequent public creditors. Any arrangement for settlement of claims, in lieu of *bona fide* money payment, on the day when such claims become due, shall be considered as a compromise, subject to the provisions of this rule.

**Liability of persons who connive at a private failure.**

147. A member who shall have received a difference on an account prior to the regular day for settling the same, or who shall have received a consideration for any prospective advance, whether by a direct payment of money or by the purchase or sale of stock at a price either above or below the market

**Receiving prospectively claims upon a defaulter.**



price at the time the bargain was contracted, or by any other means, prior to the day for settling the transaction for which the consideration was received, shall (in case of the failure of the member from whom he received such difference or consideration) refund the same for the general benefit of the creditors; and any member who shall have, under the circumstances above stated, paid or given such difference or consideration shall again pay the same to the creditors; so that in each case all persons may stand in the same situation with respect to the creditors as if no such prior settlement or other arrangement had taken place.

148. A creditor receiving, under any circumstances, a larger portion of differences on a defaulter's estate than that to which each of the creditors is entitled shall refund such portion as shall reduce his dividend to an equality with the others.

Equality of right between difference creditors.

149. Creditors for differences shall have a prior claim on all differences received by, or due to, a defaulter's estate.

Priority of claim by difference creditors.

150. Members not receiving due payment for Securities delivered on the day of default are entitled, so far as regards the value thereof, at the average price on the day of delivery, to be paid *pro rata*, and preferentially out of assets resulting in any manner from such Securities, or derived from the defaulter's own resources; and, should these prove insufficient, they shall, as to the balance of such claims, participate with other creditors in any surety money of the defaulter.

Claims for Securities delivered and not paid for.

151. In the case of loans of money made upon Securities valued at less than the market price the lender shall realize his Securities within three clear days (unless the creditors consent to a longer delay), or take them at a price to be fixed by the official assignees, with appeal to any two members of the committee. Should the security be insufficient, the difference may be proved against the defaulter's estate.

Loans on Securities valued below the market price.

152. No loan without security shall be admitted as a claim on the differences of a defaulter's estate; nor shall any such loan, when of no longer duration than two business days, be

Loans without security.

admitted as a claim on any other of his assets; and should any unsecured creditor receive payment of his loan from a member on the day of his default, such payment being made out of assets not belonging to the defaulter previously to that day, he shall refund the amount so received for the benefit of the defaulter's estate.

153. Differences allowed to remain unpaid for more than two business days beyond the day on which they become due cannot be proved against a defaulter's estate, or set off against any difference due to a defaulter at the time of his failure. Differences overdue and paid previous to the day of default are not to be refunded.

154. The committee will not admit or recognize any payment or claim on a defaulter's account that does not arise from a Stock Exchange transaction.

155. No defaulter shall be readmitted who shall not, if required, give up the name of any principal indebted to him; or who, within fourteen days from the date of his failure, shall not have delivered to the official assignees or to his creditors his original books and accounts, and a statement of the sums owing to and by him in the Stock Exchange at the time of his failure.

156. A member having compounded with his creditors, and being subsequently declared a defaulter, shall not be eligible for readmission for six months; and should he be declared in consequence of his having so compounded, his sureties shall not be called upon to pay their security money.

157. A defaulter shall not be eligible for readmission who shall not have paid from his own resources, independently of his security money, at least one third of the balance of any loss that may occur on his transactions, whether on his own account or that of principals; or who, in the event of his debts being less than the amount which his sureties may be called upon to pay, shall not have refunded to the sureties one third of the amount paid by them.

158. A member who passes or retains a ticket for shares or stock whereby loss is incurred or increased, and who shall be declared a defaulter in that account, shall not be eligible for readmission for at least one year from the date of such default, provided it be proved to the satisfaction of the committee that he knew himself to be insolvent at the time of passing or retaining the ticket.

159. No member shall carry on business for a defaulter for his benefit without the consent of the creditors and the sanction of the committee. No member shall deal with a defaulter on his own account before his readmission to the Stock Exchange.

160. No member shall transact business for a principal who to his knowledge is in default to another member, unless such person shall have made a satisfactory arrangement with his creditors.

161. Non-members shall be allowed an equal participation of assets, subject to the same conditions as members, provided their claims be admitted by the creditors, or, in case of dispute, by the committee; and a person whose claim is so admitted may be represented at the meeting of creditors by any member whom he may select.

162. No member being a creditor upon a defaulter's estate shall sell, assign, or pledge his claim on such estate to a non-member without the concurrence of the committee; and such assignment shall be immediately communicated to the official assignees.

163. If a creditor of a defaulter be dead, the dividend due to him shall be paid to his legal representative; but if the creditor himself be a defaulter, the dividend due to him shall be paid to his creditors.

164. Upon any application for the readmission of a defaulter, a sub-committee of not more than three members, to be chosen in alphabetical rotation, shall investigate his con-

duct and accounts; and no further proceedings shall be taken by the committee with regard to his readmission until the report of such sub-committee shall have been submitted, together with a balance-sheet of the defaulter's estate signed by himself.

The attention of the sub-committee shall be directed—

1st. To ascertain the amount of the greatest balance of shares or stock open at any time during the account; the current balance at his banker's, as well as the balance of shares or stock open at the time of failure; and whether the transactions were on his own account, or on account of principals, specifying the amount of each respectively.

2d. To ascertain the total amount of money paid by him, specifying the sums collected in the Stock Exchange and those received from principals, and the money or other property brought forward by himself.

3d. To ascertain the conduct of the defaulter preceding and subsequent to his failure; and to inquire of the official assignees whether any matter prejudicial, or otherwise, to the defaulter's application has transpired at any meeting of creditors, or has officially come to their knowledge elsewhere.

4th. To ascertain whether the defaulter has violated Rule 158.

165. The readmission of defaulters shall be in two distinct classes:

Classes under which defaulters are readmitted. The *first* class to be for cases of failure arising from the default of principals, or from other circumstances, where no bad faith nor breach of the regulations of the house has been practised; where the operations have been in reasonable proportion to the defaulter's means or resources; and where his general conduct has been irreproachable.

The *second* class, for cases marked by indiscretion and by the absence of reasonable caution.

The decision of the committee on the readmission of a defaulter shall remain posted in the Stock Exchange for thirty days.

166. Every defaulter, bankrupt, or insolvent applying for readmis-

Defaulters to furnish information. sion shall furnish the sub-committee with every information they may require.

## OFFICIAL ASSIGNEES.

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167. Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him; to attend meetings of creditors; to summon the defaulter before such meetings; to enter into a strict examination of every account; to investigate any bargains suspected to have been effected at unfair prices; and to manage the estate in conformity with the rules, regulations, and usages of the Stock Exchange.

168. Each official assignee shall find security amounting to £1000 from two or more members of the Stock Exchange. In the event of any default or misappropriation by either assignee of funds or property intrusted to his care, or of any other act of dishonesty on his part, each of his sureties shall pay, under direction of the committee, such sum as he shall have guaranteed.

169. The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible.

170. In every case of failure the official assignees shall publicly fix the prices current in the market immediately before the declaration, at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to, or claimed from, the official assignees. In the event of a dispute as to the prices named, they shall be fixed by two members of the committee.

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171. The official assignees shall not claim differences on a default-  
Differences not to be er's estate until they become due.  
claimed until due.

172. The official assignees shall not admit any payment to, or claim  
Claims not upon, a defaulter's estate for differences arising out of  
admitted. transactions which are specially stated in the laws of the  
committee as not sanctioned or not recognized.

173. Once in every month the official assignees shall lay before the  
Statements to committee an account of the balances in their hands be-  
be furnished longing to defaulters' estates, and the committee shall  
to the com- order such balances as they think fit to be paid over to  
mittee by assignees. the account of the Trustees of the Stock Exchange Benevolent Fund.

A statement of all sums so paid over, and of the amount remaining  
in the hands of the Trustees of the Stock Exchange Benevolent Fund  
on the 31st of December in every year, shall be furnished by the offi-  
cial assignees and deposited in the committee-room for the inspection  
of the members of the Stock Exchange.

On the 1st of March in each year the official assignees shall lay be-  
fore the committee a statement of all dividends paid during the last  
year on each defaulter's estate.

A register of Every defaulter's estate shall be registered in a book, to  
defaulters' be kept by the official assignees.  
accounts to  
be kept.

174. The scale of remuneration to the official assignees shall be as  
Scale of re- follows:  
muneration to  
assignees.

From £1 to £1000 collected . . . 5 per cent.

From £1000 to £5000 . . . . . 2 per cent.

From £5000 . . . . . 1 per cent.

Sums received from another defaulter's estate and redistributed  
shall be charged with half the above percentages; and where excep-  
tional duties have been performed by the official assignees, or where  
amounts have been collected arising from stock delivered to a default-  
er and not duly paid for by him, special allowances shall be made by  
the trustees of such defaulter's estate.

RULES AND REGULATIONS  
OF THE  
COMPANY OF STOCK AND EXCHANGE BROKERS  
OF PARIS





# RULES AND REGULATIONS

## OF THE

### COMPANY OF STOCK AND EXCHANGE BROKERS OF PARIS.

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Drawn up in conformity with the provisions of Art. 90 of the Code of Commerce, and Art. 6 of the royal decree of the 29th of May, 1816.

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## PART I.

### ORGANIZATION OF THE COMPANY.

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#### PRELIMINARY CHAPTER.

The Company of the Paris Bank, Exchange, Trade, and Finance Brokers is composed of sixty ministerially appointed officers, who are nominated to the Paris Bourse.

Every agent de change is nominated by a decree, on the representation of the Syndical Chamber and on the proposition of the Minister of Finance. He cannot enter on his duties until he has justified in his bail bond, taken his oath, and been received and installed by the company in general meeting assembled.

The company is managed, supervised, and represented by a body of seven of its members, elected by the company, and which forms the Syndical Chamber.

The company assembles in general meeting to receive new Brokers, to hold elections, and generally to pass on all questions referred to it by its regulations, by the statutes of the Common Fund, or by the Syndical Chamber.

The company can retain those of its members who may resign, by

conferring on them the title of honorary agent de change, whenever it deems them worthy of the same.

The agents can enter into association with sleeping partners interested with them (law July 2, 1862).

They can also admit into association one or two head clerks (decree Oct. 13, 1859).

The agents have established a Common Fund among themselves, which is to defray all the expenses of the company. The accounts are verified by a committee.

## CHAPTER I.

### AGENTS DE CHANGE.

#### *Presentation ; Nomination ; Reception.*

ARTICLE 1. No one can be agent de change—

1. If he is not a Frenchman.
2. If he is not fully twenty-five years of age.
3. If he does not produce a certificate of capacity and good character, signed by the heads of several banking or commercial houses (decree Oct. 1, 1862).

ART. 2. Any act relating to the transfer of a membership must be in conformity with the rule agreed upon by the Syndical Chamber, and it only becomes binding upon the parties when the Chamber has given its approval.

ART. 3. To this contract must be annexed :

1. A declaration, signed by the seller and purchaser, that no advantage other than the price indicated in the said contract has been stipulated between them.
2. An engagement, likewise signed by both parties, to the effect that, as the Common Fund and the Syndical Chamber do not recognize third parties, the purchaser has, in consideration of an indemnity to be fixed by the Syndical Chamber, relinquished his rights to all moneys, whether in liquidated sums or not, which the seller might claim from the Common Fund and Syndical Chamber.
3. The form of contract with the future sleeping partners, if the candidate intends having any.

ART. 4. The retiring Broker presents his successor for the approval

of the Syndical Chamber, which then proposes him to the Minister of Finance, to obtain the investiture, after the formalities indicated in the following article have been carried out.

In case of the decease or disability of the Broker, his heirs-at-law or proxies may fulfil the same formalities.

ART. 5. The accepted candidate agrees in a written form, and before the Syndical Chamber, to observe faithfully the regulations of the company, which he declares to have taken due cognizance of. His name is then posted up in the room of the Bourse for fifteen days. In addition to the announcement of the transfer of membership, the posted notice, which is signed by the syndic, must contain the Christian and family names of all the silent partners interested with the candidate, with the sum contributed by each. The notice is for the purpose of eliciting any information possessed by the members of the company. When the term fixed by the posted notice has expired, the syndics decide in secret ballot on the admission or rejection of the candidate. Three black-balls entail non-admission.

ART. 6. The reception of the new agent de change is arranged as follows :

The company being assembled, the syndic requests the two members of the company who have been designated by the new member as his sponsors to introduce him to the meeting.

The new member, on being introduced, remains standing in front of the desk, while the syndic reads :

1. The communication of the Ministry of Finance containing the nomination.

2. The nomination.

3. The official oath taken before the Tribunal of Commerce, with a statement testifying that the amount of his guarantee has been paid into the public treasury.

The syndic thereupon reminds the new member that he has promised to submit to the regulations governing the company (a copy of which has been given him), and to religiously obey them, also all the decisions of the Syndical Chamber.

The new member repeats this promise, which fact is stated in the official report signed by the new agent de change.

The syndic then declares, in the name of the company, that, all the

formalities having been fulfilled, the new member is received as an agent de change, and orders his name to be inscribed on the rolls of the company.

ART. 7. Every newly elected agent de change pays into the funds of the company a sum of 2500 francs to defray the expenses of his reception.

ART. 8. Any agent de change who terminates his connection with the company cannot re-enter.

If, however, through exceptional circumstances, an agent de change should find himself obliged to retake his former membership, the subject of his admissibility would be submitted to the decision of the company, and a three-fourths vote of the members present would be requisite for such readmission.

In this case his first term would be counted as the entrance-fee.

## CHAPTER II.

### SYNDICAL CHAMBER.

ART. 9. In the month of December of every year the company assembled in meeting proceeds to the election of syndics by secret ballot, and an absolute majority of the votes cast is necessary for such election.

The official report of the election of members of the Syndical Chamber is sent within twenty-four hours to the ministers, the prefect of police, and the prefect of the department of the Seine.

ART. 10. To be a syndic it is necessary to have been agent de change for at least five years, and to have been a deputy for three years.

Members who are elected syndics or deputies cannot refuse to serve, unless for good reasons deemed sufficient by the company.

ART. 11. The term of office of the members of the Syndical Chamber is one year.

ART. 12. The syndic can be re-elected for five consecutive years. If the syndic, however, who by the terms of this article cannot be re-elected, obtains on the first ballot three fourths of the suffrages of

the members present, he thereby becomes eligible for a new term, exactly as if there had been an interruption in his functions.

The time of partial elections will not be included in the five years.

ART. 13. The deputies can be re-elected for three years; two of them must be replaced every year.

That portion of the triennial period of service begun by a deputy which has been completed is deducted from the term of his successor.

Before election the Syndical Chamber informs the company of the names of the members whose terms legally expire.

ART. 14. Any member retiring from the Syndical Chamber is re-eligible after a twelvemonth's interval, or at the first election resulting from one or more vacancies in the Chamber.

ART. 15. The Chamber meets at every call of the syndic, or at the request of three deputies.

The oldest agent de change (*doyen*) may, with the consent of the Syndical Chamber, attend its sittings and have a consulting vote.

The Chamber cannot decide on any matter unless a quorum of five members be present.

In case of the absence or illness of more than two of its members, the Chamber is empowered to complete its number by calling in, in the first instance, the members of the Committee on Accounts, and, in default of these, such of the agents as obtained the greatest number of votes after the deputies at the last general election.

ART. 16. The Syndical Chamber keeps a record of its sittings, each report being signed by all the members who attended the meeting.

It decides by an absolute majority of votes except in the case provided for in Art. 5.

The syndic presides; in case of a division, his vote counts for two.

ART. 17. In the absence of the syndic, his duties are performed by the first deputy; in default of the latter, by the second deputy, and so forth.

ART. 18. The Syndical Chamber is charged with keeping a strict surveillance, so that, under no pretext whatever, shall any encroachment upon the functions and privileges of the members of the company be allowed. It denounces offenders to the tribunals or administrative authorities according to the case, and takes all steps and measures that may be necessary for securing justice.

ART. 19. The Syndical Chamber, having to watch over the safety of the company and of each of its members, must also summon before it any agent de change whose operations may be a cause of uneasiness to the company, so as to ascertain whether he has taken all necessary precautions for carrying out his engagements. It may require from him, in this respect, such guarantees as it may deem indispensable, even the deposit of securities with the Syndical Fund.

Whenever this examination is called for by three members of the Chamber, or by ten agents, the Syndical Chamber must order the same.

ART. 20. The Syndical Chamber has supreme and final authority in all disputes and contests that may arise between agents in the exercise of their office.

When a member of the Syndical Chamber is interested in a case that is before said Chamber, he must abstain from sitting during the discussion and judgment on said case.

ART. 21. The members of the Syndical Chamber must keep the proceedings of the company secret.

ART. 22. Every member of the company has the right to come before the Syndical Chamber whenever he may have a communication to make.

ART. 23. Two deputies, called acting-deputies, are appointed every month to preside over the preparation of the list of quotations of public and private securities, for money and for the account, and to attend to payments in general.

They must specially see to the observance of the rules and to the maintenance of order in the company. Any disputes among the agents de change that require prompt settlement may be submitted to their judgment.

ART. 24. The syndic, his deputies, the senior member of the

agents when he attends the meetings, and the agents *de change* when they are called to perform the duties of deputies, receive "checks" (small pieces of metal), in token of their presence, in conformity with the provisions of Art. 227.

**ART. 25. *Disciplinary Council.***—The Syndical Chamber, having the authority of a disciplinary council over the members of the company, conformably to the law of May 29, 1816, is charged with the strictest surveillance as to the manner in which each agent transacts his business. It therefore censures, suspends from his duties, or designates to the Minister of Finance for dismissal, every agent *de change* who does not confine himself strictly to his duties, or who introduces into his operations or into the collection of his dues any innovations that may be injurious to the public weal and to the interests of the company. And, as these cases can be neither foreseen nor defined, the Syndical Chamber is invested with a discretionary power in this respect, which it must use to defend the general interest against the encroachments of misunderstood private interests.

**ART. 26.** The Syndical Chamber summons before it any agent *de change* who is suspected of violating the rules, for the purpose of obtaining his justification or explanation.

**ART. 27.** Any infraction of the rules and usages of the company may, in addition to the penalties prescribed under Art. 25, be visited with a fine, the amount of which is determined by the Syndical Chamber according to the gravity of the case.

### CHAPTER III.

#### GENERAL MEETINGS.

**ART. 28.** A general meeting is held when half the members, with one additional member, are present. The decisions arrived at by such meeting are binding on the entire company.

**ART. 29.** General meetings can only be called by the Syndical Chamber when it thinks proper, or at the written and justified request of an absolute majority of the company.

They are fixed for a certain hour, which is stated on the invitation tickets.

ART. 30. All the members must be seated at the general meetings. The syndic and the members of the Syndical Chamber meet as a *bureau*, along with the senior member.

The syndic, who presides over the meeting, and who conducts its proceedings, explains the matters to be discussed, as well as the reasons and arguments *pro* and *con*.

After this statement he opens the discussion. When the discussion is over, each gives his opinion by voting with white or black balls for accepting or rejecting the proposition.

The majority must be either absolute, two thirds, or three fourths, according to the matters under deliberation.

ART. 31. When a member desires to be heard, he applies to the syndic for permission to speak.

ART. 32. The Syndical Chamber keeps special minutes of the deliberations of the general meetings, said minutes being signed by all the members present.

ART. 33. Every member receives tokens of presence in attestation of his attendance at the general meetings, conformably with provisions of Art. 227.

The members who arrive after the opening of the sessions, and those who leave before the signature of the official minutes, lose their right to these "checks."

ART. 34. Each member can only sign the minutes and the list of those present in his turn, in the order of his arrival, and on being called by a member of the *bureau*.

## CHAPTER IV.

### OF HONORARY MEMBERS.

ART. 35. The agent de change who retires, and who desires to remain connected with the company as an honorary member, must make application for the honorary position.

A list of the disciplinary penalties he has incurred during his service is laid before the company.

ART. 36. No one can be made an honorary agent de change with-



out the consent of the company, given in a general meeting by secret ballot, and according to the following conditions :

ART. 37. To be an honorary agent de change, the applicant must have been an active member for fifteen years, and must have on the first ballot a majority vote of the members present.

Any agent de change, however, who has been elected three times as syndic of the company is entitled to the honorary title by this fact alone.

Ten years spent as active member also render any agent eligible who has been elected three times as deputy to the syndic.

The years spent in the Syndical Chamber count double.

ART. 38. Should an agent de change, not fulfilling the conditions prescribed by the above articles, show special reasons for an exception, he can, on the expressed written request of five members of the company, obtain the honorary title, but on the express condition of being an active member of at least twelve years' standing, and of having a three-fourths vote on the first vote cast.

ART. 39. Any part of a year is counted as a full year in every instance.

ART. 40. An agent de change can in no case vote for an honorary membership at the sitting at which he has been received.

ART. 41. The honorary agent de change retains his title and receives a gold medal, with his name and the date of his nomination engraved thereon.

ART. 42. The honorary agents de change are admitted to the rooms of the company during Bourse hours.

They attend the general meetings held at the end of each year and those called for the admission of new agents. They receive tokens of attendance the same as active members.

ART. 43. An honorary agent de change may be deprived of his privileges and title by a three-fourths vote of the company in general meeting assembled.

ART. 44. In the event of the decease of an honorary member, and at the written request of the family, a deputation of six members, in order of the roll, and under the presidency of a member of the Syndical Chamber, is appointed to attend the funeral.

## CHAPTER V.

### SLEEPING OR SILENT PARTNERS.

ART. 45. The agents de change can associate with them sleeping partners, who share in the profit and loss arising from the pursuit of the business and its liquidation. The sleeping partners are liable only for losses to the amount of the capital that they have invested.

ART. 46. The incumbent of the "seat" must always be owner, in his personal name, of at least one fourth of the sum representing the price of the membership and the amount of the guarantee.

ART. 47. The articles of association with the sleeping partners must be drawn up according to the form approved of by the Syndical Chamber, and submitted to its sanction. They must specially mention that, in case of dispute as to the articles of the contract, the Syndical Chamber alone possesses a final and sovereign authority; the parties renouncing beforehand their right to an appeal or any other recourse to the courts, or even to arbitrators, and promising to carry out faithfully the decisions of the Syndical Chamber.

These papers are communicated to the Minister of Finance, and must be registered, deposited, and published in conformity with the law.

ART. 48. Any change in the capital of the firm, in the *personnel* of the sleeping partners, or in the proportions of interest, must be likewise recorded according to the forms of the Syndical Chamber, and submitted for its approval.

The acts and papers relating thereto are registered, deposited, and published in the same way as the original articles.

The formalities indicated above must be complied with, under penalty of nullity concerning those interested, without regard to whether the error has been committed by the parties interested or not.

ART. 49. The contracts between the member and his sleeping partners must be drawn up on stamped paper, and in as many copies as there are parties to the same, with an additional one to be deposited with the Syndical Chamber, another in the record office of the Tribunal of Commerce, and a third in the record office of the justice of the peace of the arrondissement in which the offices of the agent de change are situated.

Each of these copies must be signed by all the parties. That which is deposited in the archives of the Syndical Chamber, and which states the fact of the registry, must not be removed in any case.

ART. 50. These deeds are not confined to the legal form.

ART. 51. A sleeping partner of one agent de change cannot become the silent partner of another without the authorization of the first.

ART. 52. A firm cannot be a sleeping partner by the community of its interests with those of an agent de change.

ART. 53. A sleeping partner who, disregarding his articles of association, should bring any disputes arising from the same before the courts cannot be admitted again to another partnership with a member.

ART. 54. Unless there is an agreement to the contrary, the sleeping partner, in case of retirement, remains responsible until the complete winding-up of the business which may be under way at the time of such withdrawal. Any new operation, however, does not concern him.

ART. 55. A register is kept containing, in addition to the names of the agents de change, those of their silent partners, with the particulars of their respective shares of interest. This register is kept in the meeting-room of the Syndical Chamber.

All changes that are made are also entered therein.

Every agent de change has the right to examine this record.

## CHAPTER VI.

### PERSONNEL OF THE AGENTS DE CHANGE.

ART. 56. Every member of the company must, at the request made by the Syndical Chamber at least once a year, send to the said

Chamber a list of the sleeping partners, clerks, and employés of all kinds connected with his office, and containing—

1. Their Christian and family names.
2. The special nature of their duties.
3. As regards the sleeping partners, the interest which they have in the firm.
4. The salaries of the principal and other clerks, or the interest that is allowed them from the general profits of the business.

This information is collated, classified, and kept in the secretary's room of the company.

The Syndical Chamber must be immediately informed of any changes occurring in the above-mentioned circumstances; the said Chamber can always demand explanations or order an investigation into the subject of such changes.

ART. 57. No head clerk or employé can enter the service of another agent de change without having first obtained the written sanction of the one with whom he was last employed.

ART. 58. *Powers of Attorney.*—Agents de change may, by special powers of attorney, appoint one or several persons separately or collectively to represent them in the administrative proceedings in which they can be represented by agents.

A notice of the power of attorney, with the signature of the proxy or proxies in the margin, must be deposited with the Syndical Chamber.

A circular is sent to all the agents de change, informing them of the power of attorney so given, and of the signature of the proxy or proxies.

The proxies may sign, in the same manner as the agent de change, the contracts for the account, the memoranda of delivery of stocks, and all receipts for specie or securities, and perform all acts mentioned in the power of attorney.

ART. 59. *Head-clerks.*—The agents de change are empowered to associate with them one or two head-clerks (decree Oct. 13, 1859).

ART. 60. No one can be head-clerk unless he is fully twenty-five years of age, and can prove his good character.

When the agent de change selects a head-clerk, he must give notice to the Syndical Chamber.

The name of the candidate thus presented is posted up in the room of the company in the Bourse for eight days.

On the expiration of this time, the Syndical Chamber deliberates on the admission or rejection of the candidate.

ART. 61. The list of the head-clerks is posted up inside the Bourse and in the company's room.

ART. 62. The head-clerks are authorized to conclude negotiations either with one another or with the agents de change. They are subject to the same rules as the agents themselves.

ART. 63. The head-clerks are authorized to keep a memorandum-book, an abstract of which is made every day, after the close of business, in the offices and books of the agent de change.

This memorandum may be distributed at the expense of the Common Fund of the company, at the request of the agent de change.

ART. 64. The dismissal of a head-clerk, pronounced by the Syndical Chamber, *ex officio*, or at the solicitation of the agent de change, must be immediately brought to the knowledge of the company.

## CHAPTER VII.

### OF THE RIGHTS AND OBLIGATIONS OF AGENTS DE CHANGE.

ART. 65. The agents de change are personally responsible for their operations with their fellow-agents.

ART. 66. In negotiations for the account, in securities transferable and to bearer, where the maturity of these transactions renders a settlement obligatory on the 1st and 16th of each month, the Client must deliver to his agent de change, the same day, and before the opening of the Bourse, the necessary money for the payment of the purchased stock, or the necessary securities for the delivery of those he has sold.

In default of the Client fulfilling these conditions, the Broker has the right to buy in or sell out, on the same day, the securities mentioned in the contract, and at the cost and risk of the defaulting Client.

In dealings with options, if, after the hour fixed for the *réponse*,

the customer has not fulfilled the conditions mentioned in the first paragraph of the present article, the agent de change has the same redress against him.

ART. 67. The agents de change can form no partnerships between themselves.

ART. 68. The agents can transact no business for persons who are declared bankrupt, or who have failed to carry out their engagements.

ART. 69. They are prohibited from transacting any business for parties fulfilling any functions in the office of a fellow-agent, or for the employés of the latter.

ART. 70. They are also prohibited from sharing commissions in doing business.

ART. 71. The accounts must be kept by double-entry, and in the books prescribed by the Syndical Chamber.

ART. 72. The agents de change are only responsible for such sums or securities as are directly delivered into their custody.

Their engagements by letter do not bind them, except in so far as they are signed by themselves or their empowered agents.

ART. 73. The agents de change must keep a safe in their offices for the convenience and use of Clients who have to transact business through their agency.

ART. 74. The agents de change must keep inviolably secret the names of the persons who intrust them with negotiations, unless the parties consent to be named, or the nature of the transaction does not require such secrecy; without prejudice, however, to the right of examination and complete investigation that belongs to the Syndical Chamber.

There is no exception to this rule, except for information demanded by the law.

ART. 75. The law allows the Broker the commission of one quarter of one per cent., payable by the seller, and also by the buyer.

Nevertheless, the Syndical Chamber annually fixes the minimum commissions to be collected for operations made either for money or the account.

The tariff of commissions is sent to every member of the company, and all are bound to comply with it.

ART. 76. No agent de change can begin or carry on an action at law without having previously obtained the sanction of the Syndical Chamber.

ART. 77. No agent de change can have his offices in a building that is already occupied by another agent de change.

This prohibition ceases only on the lapse of two years after the departure of his fellow-agent de change.

ART. 78. Any Broker who is obliged to absent himself is required to notify the syndic in writing of such absence. He can designate, by a special authorization, one of his agents, or some other person more particularly charged with replacing him in case of absence, but who must not, under any pretext, make any operation directly with an agent de change.

When such representative of an agent has a transaction to perform, he applies to an agent de change, who executes the order in the name of his absent fellow-agent de change.

ART. 79. In case of the suspension of an agent de change, and during the time determined upon by the Syndical Chamber, he is prohibited from entering the *parquet* and the room of the agents de change.

ART. 80. When an agent de change is compelled to leave the *parquet* by embarrassment in his affairs, the Syndical Chamber informs the company immediately of the fact.

All the Brokers who have accounts with the embarrassed member send statements of the same to the Syndical Chamber.

The members of the Committee on Accounts verify the statements. After making the "settling prices," the balance of the operations for money and the account that are not set off against each other is liquidated, at the risk and cost of each agent concerned, at the average quotation of the day on which his embarrassment was announced.

When option contracts are in question, a special call is made as to

the settling prices in the manner usually adopted with reference to *réponses des primes* (call of options to ascertain whether option contracts are taken or margins on the same abandoned).

ART. 81. When an agent de change dies in the active discharge of his duties, it is necessary :

1. To send a request to the President of the Civil Tribunal to appoint a temporary administrator of his office.

2. To draw up a statement in liquidation.

3. To prepare a statement of the rentes or other registered securities which may be in the name of the deceased in consequence of transfers made to him ; to have the accuracy of the paper certified to by the syndic, and to produce it in the Register's office, that the same may not levy the tax of succession on said securities, which are then retransferred to the owners.

ART. 82. In case of the decease of an agent de change in office, a deputation of twelve members, presided over by a member of the Syndical Chamber, is appointed to attend the funeral.

In case of the decease of the wife of an agent, the deputation consists of six members.

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## PART II.

### OPERATIONS AND DELIVERIES.

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#### CHAPTER I.

##### GENERAL PROVISIONS.

ART. 83. By the terms of the law, agents de change are alone entitled to deal, with the assistance of their head-clerks, in public and other securities susceptible of being quoted, either for cash or for the account. Violations are punished by law of 28 Ventose, An 9 (March 19, 1801).

ART. 84. These negotiations are open to competition and publicity on the Bourse among the agents de change, whether they deal among themselves or for each other's Clients.

ART. 85. The Broker who offers must state at what price he offers ; the Broker who bids must state at what price he bids.



ART. 86. All the transactions by agents de change must be recorded in the memorandum-book, as described in Art. 215, at the time they are made, and then transcribed in a stamped journal, in conformity with the law.

ART. 87. When an error has been found in a transaction entered into by two agents de change, the result is divided; but every transaction entered by a Broker, and not written down by his fellow-Broker, concerns only the Broker who has recorded the same.

## CHAPTER II.

### OF NEGOTIATIONS PROPERLY SO CALLED.

#### SECTION I.

##### *Negotiating Exchange.*

ART. 88. Agents de change cannot deal in exchange for their own account.

When an agent de change has concluded a negotiation of commercial paper between two bankers or merchants, he gives a document to the two parties, stating the amount, nature, maturity, and price of the paper, and "gives up" both parties to each other. He immediately enters the said document in his memorandum-book.

#### SECTION II.

##### *Of Dealings in Cash.*

ART. 89. The agents de change are obliged to hand each other, for the execution of cash operations, engagements on unstamped paper (blue-colored for sales and red for purchases), which are exchanged before the next Bourse.

ART. 90. The deliveries of shares between agents are accompanied by schedules, which are subjected to a stamp-tax for the benefit of the Common and Syndical Fund, under the conditions prescribed by Art. 209 and the articles following.

ART. 91. Securities to bearer, and others that are transferable by endorsement and negotiated for cash, can be delivered by the seller to the purchaser in the interval between one Bourse and another. They

must be delivered before the fourth Bourse following the transaction, in conformity with the table annexed :

DELAYS CONCERNING THE SELLER.	DELAYS CONCERNING THE BUYER.
1st Bourse day.—Negotiation.	<p>The seller may deliver on the day following the operation.</p> <p>In default of payment, notice of sale to the buyer on the day of the presentation of the securities, and on the day following they are to be sold for his account.</p>
2d    "    "    —Delivery.	
3d    "    "         "	
4th   "    "         "	
5th   "    "    —Notice of buying in.	
6th Bourse day.—Buying in.	

These securities must be designated by their nature, numbers, quantities, amounts, and terms of expiration in the delivery schedule prescribed by Article 211 ; and they are paid for in cash on the presentation of said schedule duly received.

ART. 92. The negotiation of all registered securities is subject to the following rules :

The agent de change who is the buyer of securities which may have to be transferred gives the seller, before the Bourse following that on which the negotiation was made, a ticket signed by him, and containing the amounts of such securities, the price agreed upon, as well as the names and surnames of the persons to whom the transfer must be made.

When the negotiated securities are only transferable with the acceptance of the purchaser, the buying agent de change may furnish to the seller, within the above stated period, his own acceptance instead of other names.

ART. 93. The transfer is not a token of ownership until payment of the price by the purchaser to whose name the securities have been transferred.

The seller always has the right to refuse to transfer to names other than those of his immediate purchasers.

ART. 94. If the buying agent de change begs the vendor to accept,

in lieu of his own names or acceptances, those of another agent de change, to whom he may in his turn have transferred the same securities, it is the seller's right and duty to offer delivery, and to claim payment directly from the Broker to whose name he has transferred the securities, to save his recourse against his direct purchaser. The price that he receives must serve him as compensation for any intermediate negotiations.

ART. 95. The registered securities that are negotiated for cash may be delivered by the seller on the day following the delivery of the names and acceptances. They must be delivered before the sixth Bourse following that of the transaction (conformably to the annexed table), on the presentation of a ticket containing the rules as stated in Art. 91.

ART. 96. A security called in for payment ceases to be negotiable on the day of drawing.

ART. 97. The negotiation of securities liable to be paid off by a drawing, or giving the holder a right to a subscription or other privilege, must, according to the ordinary delays for deliveries, be suspended, as follows :

The fifth day before the drawing, or closing of the subscription-books, if securities to bearer are in question.

The seventh day before the same period, if they are registered securities.

In order to facilitate transactions, however, it is permissible to deal during this interval by special agreement.

DELAYS CONCERNING SELLER.	DELAYS CONCERNING BUYER.
1st Bourse day.—Negotiation.	1st Bourse day.—Negotiation.
2d " " —Before Bourse, receiving names or acceptances.	2d " " —Before Bourse opening, delivery of names or acceptances.
3d Bourse day.—Delivery.	The seller can deliver on the day after receiving names or acceptances. If the buying agent has not de-
4th " " "	
5th " " "	

DELAYS CONCERNING SELLER.	DELAYS CONCERNING BUYER.
6th Bourse day.—Delivery.	<p>livered, on the third day after the negotiation, his names or acceptances, or those of his Client, the selling agent is entitled to deposit with the Syndical Chamber the transfer sheet, signed and filled in with the name of the buyer.</p> <p>A <i>visa</i> is affixed to this document, and the next day—that is to say, on the fourth Bourse after the transaction—the buyer is held to have accepted delivery, and to pay the amount of the transaction on the delivery of the securities, accompanied with the transfer sheet, also countersigned, as before stated.</p> <p>In default of payment on the presentation of the stock, notice of sale for the account (under the rule) is posted up the same day, and the stock is sold the day following.</p>
7th “ “ —Notice of buying in.	
8th Bourse day.—Buying in.	

## SECTION III.

*Of Judicial or Compulsory Negotiations.*

ART. 98. When an agent de change is appointed by the legal authorities to negotiate current securities or others susceptible of being quoted, he must post up, at least twenty-four hours before the transaction, two notices signed by himself or his agents—one in the room of the agents de change, and the other in the part of the Bourse provided therefor. This latter must be countersigned by the commissary of police of the Bourse.

These two notices on stamped paper must indicate the nature of the securities to be sold, their quantity, numbers, the decision by virtue of which the sale will be made, the name of the agent de change who has been appointed, and the day on which the sale will take place.

ART. 99. The agent de change proceeds on the days announced as if for an ordinary transaction, if current securities are in question.

If non-current securities are in question, the method of procedure is the same, only the agent de change must, in addition, ask permis-

sion from the syndic or his acting deputies to have, as an exception, the stock quoted on the official bulletin in a special place and with special mention.

ART. 100. Only the agents de change can be intrusted with the sale of quoted stocks, or stocks susceptible of quotation that have been hypothecated and are sold according to the law of May 23, 1863.

They must proceed as mentioned in Arts. 98 and 99, after having previously justified their proceeding by a demand in due form of law, notice of which has been given to the debtor at least eight days before the sale.

In this case no judicial authorization is necessary.

ART. 101. When stocks which are quotable must be sold for default of payment, the procedure is the same, unless the by-laws of the company governing the security in question contain special provisions, which in that case must be conformed to.

ART. 102. The schedule of the agent serves in all cases as an official statement.

#### SECTION IV.

##### *Of Dealings for the Account and of Options.*

ART. 103. Dealings for the account, in public or private securities to bearer, or those that are registered, cannot be for a longer term than the second settling-day (*liquidation*), counting from the day the negotiation is closed.

ART. 104. The buyer always has the option to compel at will and in advance the delivery of securities, on the payment of the price agreed on, conformably to the provisions of the following articles :

ART. 105. The agents de change are obliged to give each other, in dealings for the account, engagements stamped by the Common Fund, and duly signed, in the manner prescribed by Art. 211, and which are exchanged before the next Bourse.

ART. 106. Contracts for the account and the engagements expressing them are made in sums and quantities for each kind of security, and their multiples, as follows :

2500 for the 5 per cent. rente.

2250    "     $4\frac{1}{2}$     "    "

2000    "    4    "    "

1500    "    3    "    "

25 for shares or bonds.

The Syndical Chamber fixes the multiples for transactions in foreign securities.

ART. 107. At the Bourse preceding the fortnightly settlement-days, and on the last Bourse day in each month, at the hour of half-past one, the buyers of option contracts for each of these terms of maturity shall inform the sellers whether they intend to take up the securities in question or to abandon their options.

These decisions as to options are made within five minutes, during which all other business is suspended. Options become fixed purchases when the buyer has once declared his intention to take up the stocks in question.

Immediately after the call of options, the clerks of the agents de change meet in their room to check off all the transactions relating to the same.

### CHAPTER III.

#### ON DISCOUNTS, OR DELIVERIES OF SECURITIES IN ADVANCE.

ART. 108. By the terms of Art. 104, the purchaser always has the option to have delivered to him at his will, and in advance, the securities sold, on payment of the price agreed upon, on fulfilling the following formalities:

Any buying agent de change can discount by notice to his fellow-agent de change all or part of the securities that the latter has sold him for the account, either by fixed purchase or by option.

In this case, he notifies the selling agent de change before the opening of the Bourse, by means of a posted notice, countersigned by the syndic or one of his deputies. This notice is posted up on a board provided for this purpose in the company's room. It settles the nature, price, and amounts of the securities, and the date of the transaction.

The discount notice must conform to the rule adopted by the Syndical Chamber, under pain of refusal of the countersignature.

ART. 109. The privilege of discounting by notice belongs to the agent de change who has sold to his fellow-agent de change for the same liquidation securities of the same nature in amounts equivalent to, or exceeding, those he has bought from his fellow-Broker. The discount in this case can be rendered to the discounter by the discountee.

ART. 110. The buying agent de change must, at the time of the posting-up of the notice, obtain the countersignature of a member of the Syndical Chamber to two tickets with his full names; one of these tickets being provisional, the other definitive, and both repeating the contents of the notice.

These tickets are permissible only for the minimum amounts of securities authorized in dealings for the account. The provisional ticket must be delivered to the seller before the opening of the Bourse on the same day on which the notice is posted up.

ART. 111. The discount can be transferred from Broker to Broker in the minimum fractions authorized in dealings for the account. This *circulation* lasts until half-past two.

ART. 112. The discount by notice is held to be direct as regards the first endorser; it becomes indirect for the following endorsers.

Any agent thus indirectly subjected to discount is entitled to deliver the total amount of the securities so discounted.

He has the right to refuse the discount for any securities exceeding the total amount of the notice.

ART. 113. No agent de change can discount indirectly to his confrère a sum of securities in excess of the balance of which he remains buyer.

ART. 114. Any settling price accepted during the Bourse brings with it the right of discounting indirectly the same day.

ART. 115. The options taken up can be indirectly discounted the same day that they have been accepted.

ART. 116. The clerks of the Brokers meet in their room every day after the Bourse, to give one another the provisional discount-tickets

by affixing the endorsements in the regular manner. Each of them keeps the price-ticket so as to be able to make up the schedule of differences between the quotations and place them on record next morning.

On that day, before Bourse hours, the last holder of provisional discount-tickets exchanges them with the discounting agent for definitive tickets with names, which will be delivered him by the latter at the same time as the acceptance-sheets of the transfers, if such there be. The definitive names should alone be annexed to the delivery schedule of the stock.

By an exception to this rule, securities to bearer or transferable by endorsement can be delivered the day after discounting, on the presentation of provisional names.

ART. 117. When the clerk of an agent de change, thus subjected to discount, is not present at the distribution of the provisional names, or refuses to receive them, the names are then deposited with the Syndical Chamber.

The agent de change who has made the deposit must immediately inform such discountee, so that the latter may withdraw the definitive names before the next Bourse.

ART. 118. In case the definitive names are not demanded from the original discounter before the Bourse following that of the discounting, he ascertains from the Syndical Chamber whether a deposit of the provisional names has been made, and then gives the definitive names to the agent who has made the deposit.

ART. 119. In case the deposit has not been made with the Syndical Chamber, the first discounter, from whom the definitive names have not been demanded, has them acknowledged by the acting-deputy for the purpose of annulling all provisional names circulating in unknown hands, and delivers them to the agent whose name has been posted up, and who is the guarantor for the delivery of the securities, having his own remedy against his discountee, and so on.

ART. 120. Discounted stocks, either to bearer or registered, must be delivered within the following named periods :



*Securities to Bearer and Securities Transferable by Endorsement.*

DELAYS CONCERNING THE DISCOUNTEE.	DELAYS CONCERNING THE DISCOUNTER.
1st Bourse day.—Notice. Immediately after the Bourse reception of the provisional tickets.	1st Bourse day.—Notice. <i>Visa</i> of the provisional and definitive tickets. Immediately after Bourse, delivery of the provisional ticket.
2d Day.—Withdrawal of the definitive tickets before opening of Bourse.	2d Day.—Before the Bourse, delivery of the definitive ticket.
3d Day.—Delivery.	The discountee can deliver on the day after the delivery of the provisional ticket. In case of non-payment on presentation of the securities, they can be sold out the same day by one of the acting-deputies, and without notice.
4th " "	
5th " "	
6th " —Notice of buying in.	
7th " —Buying-in.	

*Registered Securities.*

DELAYS CONCERNING THE DISCOUNTEE.	DELAYS CONCERNING THE DISCOUNTER.
1st Day of the Bourse.—Notice. Immediately after Bourse, reception of the provisional names.	1st Bourse day.—Notice. <i>Visa</i> of the provisional and definitive names. Immediately after the Bourse, delivery of the provisional names.
2d Day.—Before opening, withdrawal of the definitive names or acceptances.	2d Day.—Delivery of the final names or acceptances before the Bourse.
3d Day.—Delivery. The definitive names must be annexed to the delivery schedule of the securities.	The discountee may deliver, from the day after the delivery of the definitive names or acceptances. If the discounting Broker has not delivered his names or acceptances the third day after notice, the discountee has a right to deposit with the Syndical Chamber the transfer-sheet, signed and filled in with the
4th Day.—Delivery.	
5th " "	
6th " "	

DELAYS CONCERNING THE DISCOUNTEE.	DELAYS CONCERNING THE DISCOUNTER.
7th Day.—Notice of buying-in.	names of his discounting fellow-member.
8th “ —Buying-in.	<p>A <i>visa</i> is affixed to this sheet, and the next day—<i>i. e.</i> from the fourth Bourse day after notice—the discounter is held to accept delivery, and to pay the amount of the transaction on the delivery of the securities, accompanied with the transfer-sheet, also countersigned, as previously stated.</p> <p>In default of payment on presentation of the securities, the selling-out may be proceeded with the same day by one of the acting-deputies, without notice.</p>

ART. 121. The differences arising from the transfer of such discounts between Brokers are payable before the Bourse the day after notice.

ART. 122. Default of payment of such differences resulting from a discount of a preceding day on the part of one or more of the endorsers of the names, subjects all the indirect discounters to the cancellation of the discount.

ART. 123. When an account between Brokers is balanced in securities, in consequence of discount, no sum exceeding the balance of the account can be claimed for differences.

ART. 124. In discounting securities from which the coupons have been detached since the negotiation, the amount of those coupons must be deducted from the sum of the operation.

ART. 125. The buying-in, in consequence of discount, is held as against the Broker holding the definitive names. If this latter be unknown, the purchase is made directly as against the discountee, to save his remedy against the person to whom he has rendered the discount, and so on.

ART. 126. Should the discounting agent fail to fulfil the foregoing

formalities relating to the discount notice at the delivery of the provisional and definitive names, and, if such there be, at the buying-in under the provisions and delays fixed by table annexed to Art. 120, he has no recourse except against the agent holding the ticket with the names.

ART. 127. The Syndical Chamber draws up the schedule of purchases in consequence of discount by the lowest multiples of the quantities negotiable for the account.

## CHAPTER IV.

### OF OFFICIAL BUYING-IN AND SELLING-OUT.

ART. 128. In case of non-payment on the presentation of securities duly negotiated, they can be sold out by the acting-deputy on the same day, without notice, on the demand of the Broker who has sold them.

ART. 129. In case of non-delivery of securities, a notice, endorsed by the syndic or one of the deputies, is posted up before Bourse hours in the room of the agents de change:

1st. On the fourth Bourse after that of the transaction, when securities to bearer are in question.

2d. On the sixth Bourse succeeding that of the transaction, when securities subjected to formal transfer only are in question.

The securities are bought in the next day by the acting-deputy, on the demand of the buying agent, in conformity with the tables accompanying Arts. 91 and 95. The posted notice states the amount of the stocks, the price, and the date of the negotiation.

ART. 130. Notice of the buying-in or selling-out is given the same evening by the Syndical Chamber to the three interested Brokers. Contracts must be exchanged the next day as for ordinary transactions.

A schedule for each separate transaction is drawn up under the care of the Syndical Chamber. It contains the customary items; and, moreover, conformably to the legal tariff and the provisions of Art. 219, a brokerage of one fourth of one per cent. is charged for the benefit of the Common Fund. This schedule is presented to the agent de change who has called in the services of the Syndical Chamber, and who must pay the amount of brokerage saving his remedy against his debtor.

ART. 131. The posting-up is a sufficient notice to the agent de change for whose account the stocks are bought in. He cannot withdraw from its consequences on the pretext that he was not aware of such notice.

## CHAPTER V.

### DELIVERIES, ATTACHMENTS, PAYMENTS.

ART. 132. Securities to bearer that are numbered or initialled (*paraphés*) are not negotiable, even when they mention the cancellation of those two inscriptions.

The buyer is always entitled to return to the seller a numbered and initialled stock when he can establish the fact that the number and initials were appended before the date of the delivery to him.

ART. 133. When a Broker has delivered shares which have been subjected to attachment before delivery day, and other stock certificates are demanded from him in their stead, he has direct recourse against the person who delivered him the securities, and the latter has the same recourse, until the holder who put the shares originally on the market is reached.

ART. 134. The Broker who is declared responsible to his fellow-Broker must indemnify him for all his expenses, including his commissions. He is in this respect personally responsible; and exercises, at his own risk and peril, his recourse against his own Client.

ART. 135. The buyer has no recourse against the seller when it is shown that the attachment was made after delivery.

ART. 136. Securities having one or several coupons which bear numbers different from the certificates to which they are attached can be refused by the buyer.

ART. 137. If in the same delivery of French securities some of the coupons are attached and others detached, the latter may be replaced by money—the tax being deducted or not, according to the rules following:

ART. 138. Certificates of foreign securities may be refused if they are not furnished with their proper coupons.

ART. 139. The seller who, according to the provisions of Arts. 91 and 120, should at the latest have made delivery before the last Bourse preceding the payment of the coupon, and who makes delivery only after its detachment, must pay the entire amount of the coupon—that is, tax non-deducted.

ART. 140. The seller who, according to the same provisions of Arts. 91 and 120, had the right of delaying delivery until after payment of the coupon, can deliver the latter in kind or in money, tax deducted.

ART. 141. No security can circulate if it is not provided with at least one coupon, unless it be on the authorization of the Syndical Chamber.

ART. 142. A past due coupon which is unpaid must remain attached to the security.

ART. 143. The numerical order alone fixes the detachment of the coupons with regard to negotiations and deliveries. The time at which payment was effectively begun is of little moment.

ART. 144. The Client's schedules must be on stamped paper, conformably to law.

ART. 145. The same schedule may comprise either several purchases or sales of different securities, or transactions made at different dates for the execution of the same order, provided that the latter be for the same person, and that the stamp corresponds to the total sum of all these operations.

ART. 146. The accounts of settlement are subject to the same conditions.

ART. 147. The schedules concerning operations made by the mutual aid societies, the sinking fund, etc., are exempt from the stamp duty.

ART. 148. Payments of Brokers are made from 9 A.M. to 1 P.M. on every Bourse day.

ART. 149. All checks given by them on the Bank of France must be payable the same day.

ART. 150. All payments between Brokers for sums above 100 francs must be made by clearing orders on the Bank of France.

ART. 151. Deliveries of specie, bills, or blank checks are prohibited between Brokers unless they can be received personally by the Broker who is the creditor, or his attorney.

ART. 152. The agents de change are not bound to deliver to each other the identical numbers of the securities with which they have been intrusted for negotiation by their Clients. Their obligation does not extend beyond delivering to the buyer securities of the same nature, in equal amounts, and in absolutely the same conditions.

ART. 153. With regard to the material condition of the securities, any claim arising out of a delivery upon a purchase for cash must be made the same day.

*En liquidation* the buyer has twenty-four hours in which to make his claim.

ART. 154. Partial deliveries may be refused.

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## PART III.

### LISTING AND QUOTATION OF SECURITIES.

ART. 155. The Syndical Chamber, under the authority of the Minister of Finance, has full power to grant, refuse, suspend, or prohibit the negotiation on the Paris Bourse, either for money or for the account, of all securities other than the funds of the French government.

To this end, it may require all documents, etc., which it may believe necessary for its information to be laid before it.

ART. 156. When the Syndical Chamber considers that the quotation of a security is for the public interest, it can, by virtue of its office, allow it to be dealt in for money and the account.

It can refuse to allow a security already inscribed on the quotation list to be struck off.

ART. 157. No price or quotation can be announced except by the agents de change themselves.

ART. 158. The cash prices named by two agents must be immediately announced to the persons charged with the duty of recording the same, and at once written down by them on the list of quotations.

Each agent de change has a right to demand, when a price has been quoted, by whom and with whom it has been made.

ART. 159. The variations in the prices of cash dealings must only be expressed—by the amount of  $2\frac{1}{2}$  centimes, or its multiples, for rentes; by 1 franc 25 centimes, or its multiples, for shares above 300 francs; by 25 centimes, or its multiples, for all bonds, of whatever nature and price, and for shares of 300 francs and less; and by one sixteenth, or its multiples, for securities for which the decimal system is not employed.

ART. 160. The variations in quotations when the dealings are for the account must only be expressed—by the amount of  $2\frac{1}{2}$  centimes, or its multiples, for rentes; by 1 franc 25 centimes, or its multiples, for shares and bonds; and by one sixteenth, or its multiples, for foreign funds for which the decimal system is not used.

ART. 161. The rate for “carrying over” payment from cash to the next settling-day, or from one settling-day to another, must be inscribed in a special register at the time it is made. These rates are only definitive upon such registry.

ART. 162. The variations in the carrying rates must only be expressed—by 1 centime, or its multiples, for rentes; by 5 centimes, or its multiples, for shares and bonds; and by one thirty-secondth, or its multiples, for foreign funds for which the decimal system is not used.

ART. 163. On leaving the Bourse, the agents retire to their room to co-operate with each other in making up the quotations for the account, under the presidency and direction of one of the acting deputies.

ART. 164. The quotations for the account must indicate the first

and last, as well as the highest and lowest, prices at which dealings have been made.

ART. 165. The president of the Quotation Committee can fix the first and last prices in case of dispute, without having recourse to a vote.

ART. 166. The opening and closing prices for the account are posted up inside the Bourse immediately after the list has been drawn up.

ART. 167. Immediately after the *parquet* is closed, a table is made up giving the average prices for all the securities quoted for cash during the Bourse.

This table is posted up, under the supervision of the Syndical Chamber, in the clerks' room and inside the Bourse.

ART. 168. This average price is definitive. It can only be changed in the case of a material error after having been submitted to examination by the acting deputies.

ART. 169. No corrections can be made after the publication of the list except as regards quotations which may have been omitted. These corrections must be authorized by the acting deputies.

They cannot modify the average price of the day to which they refer.

ART. 170. The authentic list of quotations, the only official one, is signed by the syndic.

The prices of securities are enumerated in it in the order fixed by the Syndical Chamber, who are empowered either to publish it themselves, or to have it published, and to mention in the same all circumstances that may appear to them of interest to the public.

ART. 171. A committee is specially charged, under the surveillance of the Syndical Chamber, with drawing up the quotation-list for exchange and for gold and silver.

ART. 172. This committee, which is appointed every year by the Syndical Chamber, is composed of four members of the Company and of two deputies. Two of its members serve in turn under the presidency of one of the two deputies.



No member of this committee can belong to it for more than three consecutive years.

ART. 173. They meet in the room of the company on leaving the Bourse, and draw up the list of quotations for the day. They sign the record thereof in a register provided therefor. This register mentions their co-operation, for which they receive the attendance fee fixed by Art. 227, § 5.

ART. 174. They are charged, when coupons are detached from securities for which the rate of exchange is variable, with fixing the price at which the coupons must be calculated, taking as a basis the average rate of exchange during the fortnight preceding their maturity.

The price being thus fixed, a notice of the same, signed by the president of the committee, is posted up in the room of the company and in the interior of the Bourse.

ART. 175. The accounts that are sent back for certification must be delivered directly to the Syndical Chamber.

The members of the Committee on the List of Exchange Quotations can alone certify them.

The commissions due under this head are collected by the Secretary for the account of the Company.

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## PART IV.

### OF GENERAL SETTLEMENTS.

ART. 176. The settlement, or adjustment, of differences in transactions for the account, is made as follows:

Once a month for all funds of the French government, shares of the Bank of France, of the Crédit Foncier of France, and of French railways.

Twice a month for all other securities.

#### *Monthly Settlements.*

On the first Bourse of the month succeeding the transaction, the settlement takes place for all French government funds.

On the second for all other securities.

The third Bourse day is reserved for the office work of each agent de change.

The fourth for the making-up of balances between agents de change by their settling clerks.

Deliveries of securities and payments of amounts due take place on the fifth day, through the agency of the Syndical Chamber.

*Fortnightly Settlements.*

On the first Bourse following the 15th, the settlements in all securities which are subject to fortnightly adjustment are made.

The second Bourse is reserved for the office-work of the agent.

The third day is devoted to the adjustment of balances between the agents by their respective settling clerks.

The fourth day to the delivery of securities and the payment of amounts due, through the agency of the Syndical Chamber.

ART. 177. The agents de change or their settling clerks must, at the close of the Bourse, meet in the room designated for this purpose every day when settlements or adjustments are to be made, for the purpose of checking off and adjusting the differences between their transactions.

ART. 178. The acceptance of a difference is never obligatory.

ART. 179. All differences in settlements are established on the basis of a uniform price fixed by the Syndic or the two acting-deputies.

These settling prices are posted up at half-past two o'clock in the room of the agents, as well as in the settling room.

ART. 180. On each settling day every agent draws up a sheet containing an abstract—without enumeration of the amounts—of the numbers of shares of which he is buyer or seller, to balance his account with each of his *confrères*.

The agent de change who takes up registered securities in settlements must furnish, simultaneously with the delivery of these sheets, *names* when French rentes are in question, and *acceptances* when other securities are being disposed of. The *names*, or *acceptances*, must be furnished in such quantities that each of them represents the smallest fraction negotiable for the account.

The sellers must deliver with this sheet a table indicating the securities which they may have to deliver, and their quantities. This table is returned to them on the second following day, with the names of the buyers to whom they must make delivery.

ART. 181. On the day set apart for checking off amounts, a sheet is made up giving only—without mention of the securities—the amount of the balances of each agent de change with his *confrères*.

ART. 182. The money differences between amounts or “delegations” are only put down in this sheet after their acceptance, which alone makes them valid. Acknowledgments for the same must always be made out to the order of an agent de change, for sums ending at least with three zeros, and, as far as possible, on a uniform model, announced and recognized on the evening on which amounts are checked off. These “delegations” are returned receipted the next day.

ART. 183. “Delegations” of agents de change between themselves are prohibited.

ART. 184. The agents or their settling clerks must, before checking off, agree with each other that the amounts on the two sheets correspond, and draw the definitive balance, be it either debit or credit.

ART. 185. The sheet containing the amounts due by each agent is, moreover, accompanied with a table of recapitulation, showing the balance, “delegations” not included, and the amounts of stocks taken up or delivered, with their values calculated at the fixed adjustment rate.

An abstract of the money balances which thus appear is addressed by the General Secretary and deposited in the rooms of the company.

ART. 186. These various sheets and tables, which thus comprise a complete abstract of all the stock and money balances, are drawn up according to a uniform model furnished by the Syndical Chamber, all changes modifying the established rule being expressly prohibited.

ART. 187. After all the sheets have been verified, checked off, and balanced, they are returned each day to the office of the General Secretary.

ART. 188. The General Secretary then draws up four separate returns.

The first contains the securities to be delivered, with the numbers and names of the sellers.

The second, the securities to be taken up, with the numbers and names of the buyers.

The third, the amounts to be paid, with the names of the debtors.

The fourth, the amounts to be received, with the names of the creditors.

These tables, once drawn up, can only be changed with the authorization of the Syndical Chamber.

The last two are immediately sent to the Bank of France.

ART. 189. In case of error, and as an exception, the stock sheets of an agent de change can be changed after having been checked off, as follows:

For registered stocks, on the day before the checking-off of the amounts.

For securities to bearer, on the day on which amounts are checked off.

ART. 190. Any demand for a change in the sheet must be preferred by letter, signed by the Broker who makes such demand, and countersigned by one of the acting-deputies.

ART. 191. It must be accompanied with twice as many stamped contracts as there are amounts of stock to be subjected to the change proposed.

ART. 192. The agents de change or their settling-clerks must meet with the Syndical Chamber at four o'clock to make these changes.

Notice of the changes must be given on the same evening to all the interested Brokers.

ART. 193. All deliveries in settlement of stocks must be accompanied by a signed schedule.

If securities to bearer are in question, this schedule must indicate the amounts taken up.

ART. 194. The delivery of French rentes must be made in registered stock.

Stock to bearer must be always divided into packages containing precisely the smallest amounts negotiable for the account.

Several packages may be attached together with a single schedule.

ART. 195. The Brokers appearing as debtors on settlement must make their payments before noon, so as to return the receipts of the same to the General Secretary's office by noon at the latest.

All securities must be delivered to him at the same hour.

The General Secretary must not credit the accounts at the bank until all the payments have been made and all the stocks delivered.

ART. 196. The agent de change who is unable to deliver the securities due by him for settlement is allowed by courtesy to furnish to his *confrère*, to whom he was to have made delivery, a bond for delivery at some time other than the settlement day.

In order that this bond shall be received by the General Secretary instead of the securities that it represents, it is requisite—

1st. That it should bear the acceptance of the agent de change appearing as the buyer, or of his representative holding his power of attorney.

2d. That it be accompanied with a "clearing-check" in the name of the above purchaser for an amount equal to the price of the non-delivered stock, calculated at the settling price.

3d. That there be annexed to it, as a penalty, a number of stamped contracts representing double the amount of the undelivered stock.

ART. 197. The agent de change to whom such a bond is offered always has the option of refusing it.

In this case, the person who cannot deliver must immediately inform the General Secretary, and at the same time hand him the unaccepted bond, with the "clearing-check" and the stamped engagements in the form and numbers above indicated.

The General Secretary refers the matter immediately to the syndic or the acting-deputies.

The latter proceed at once to buy in, under the rule, the undelivered securities at the risk and peril of the defaulter. This buying-in takes place without any kind of formality.

ART. 198. In case of non-delivery at the time agreed upon, the agent de change who has accepted the bond can have the securities bought in without being bound to observe any formality.

ART. 199. As soon as the payments have been made and the stocks delivered, the General Secretary takes charge of their proper classifica-

tion, and ascertains whether all the stocks enumerated on the respective sheets are entered upon the account of those who take them up.

The delivery of the securities only begins when the General Secretary has ascertained that no portion of the same is missing. They must be delivered together, *i. e.*, each agent must receive all the securities which he is to take up.

The General Secretary is expressly prohibited from making partial deliveries of stocks on account.

The delivery must be made to the agent *de change* personally, or to a clerk having his special authorization, which must include a detailed statement of the securities to be received and a certified specimen of the signature of the said clerk.

The delivery must be made in proper order of precedence to each recipient, who immediately makes sure that all the stocks due have been delivered to him.

The Broker or his attorney signs on the margin of a register *ad hoc*.

ART. 200. Any claim relating to the irregularity of securities delivered in settlements is only admissible when made within twenty-four hours.

ART. 201. Two Brokers, who are designated in turn by the syndic, or two acting-deputies supervise and conclude the settlements.

They must present themselves at six P.M. on the day for checking off amounts.

They report to the Syndical Chamber any irregularities that may have taken place.

They receive an attendance-fee fixed by Art. 227, § 6.

ART. 202. On the day fixed for payments and deliveries, clerks are designated in turn, who place themselves at the service of the General Secretary, and are required to help him in receiving and verifying the securities. They must be in attendance in the room of the Bourse at nine A.M.

They are entitled to an allowance for this service.

ART. 203. Clerks who are reported by the liquidating Brokers are liable to be fined by the Syndical Chamber.

ART. 204. The proceeds of such fines form a fund, which is dis-

tributed every year by the Syndical Chamber to those clerks engaged in settlements whose work has been most satisfactory.

ART. 205. The Syndical Chamber may refuse further to allow any clerk to participate in the work of settlements who has several times been reported by the liquidating Brokers.

ART. 206. All infractions of the present rules, or any irregularities which may have obstructed the work of settlement are punishable by such fines as the Syndical Chamber may deem suitable.

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## PART V.

### THE COMMON FUND.

#### *Preliminary Chapter.*

ART. 207. A Common Fund is established by the Company of the Paris Agents de Change, conformably to the decision arrived at unanimously in their general meeting of March 21, 1822.

### CHAPTER I.

#### REVENUES APPROPRIATED TO THE COMMON FUND, AND MODE OF THEIR APPROPRIATION.

ART. 208. The revenues of the Common Fund are composed of—

1. A portion of the commissions received by each agent de change from the transactions with which he is intrusted.
2. Of the proceeds of the sales of the numbered and stamped memorandum-books used by the agents de change and their head-clerks.
3. Of the total amount of all fees receivable by the agents de change for the certification of returned accounts.
4. Of the proceeds of the temporary investment of funds.
5. Of the proceeds of commissions derived from the administration of the General Treasury.
6. Of the contingent proceeds, as of dues on official sales and purchases (in "buying in" or "selling out"), of fines, reception dues, certificates of quotations, etc.

NOTE.—The authorized draft of the printed rules omits Arts. 209 to 217, relating to private matters reserved strictly to the knowledge of the members of the company.

ART. 218. The reception dues for an agent de change are fixed at 2500 francs.

ART. 219. The commission for "buying in," or "selling out," under the rule, is one fourth of one per cent.

## CHAPTER II.

### USES OF THE COMMON FUND.

ART. 220. The receipts of the Common Fund belong to the company. Each agent de change is entitled to one sixtieth.

ART. 221. The Common Fund is charged with paying all the expenses of the company; consequently, all individual contributions or assessments for the purpose of defraying such expenses are prohibited under any pretext whatever.

ART. 222. The ordinary expenses of the company are paid on the order of the syndic, the parties receiving payment giving acknowledgments of the same.

Pensions, donations, etc., are paid conformably to the decisions authorizing them.

ART. 223. The distribution of the proceeds of the Common Fund is fixed by the Syndical Chamber, and made at the general settlements of the 31st of May and 30th of November of each year.

ART. 224. The proportion of dividends to which each member is entitled, whether in available cash or in the collective credits on the books, shall be transferred to him only after deduction of the advances that may have been made to him out of the Common Fund, as the cash dividend to be divided, as well as the amounts to be credited on the books, remain exclusive guarantees for the advances made to any member.

ART. 225. If, in consequence of embarrassment in his affairs, an agent de change discontinues to frequent the *parquet* of the Bourse, he thereby ceases to be entitled to his share in the Common Fund, dating from the day of his absence. His accounts are made up and closed, and thereafter he has no further participation in the Common Fund.



### CHAPTER III.

#### FEEs FOR SERVICES.

ART. 226. The Common Fund has "checks" for services struck off in the name of the company.

These "checks" are of silver; their value is fixed at 5 francs.

ART. 227. They are specially used for settling the attendance fees incident to the inner service of the company.

These fees are fixed as follows:

1. *Sessions of the Syndical Chamber.*—Every time the Syndical Chamber meets, the president receives four and each of the assistants two such checks.

2. *Acting-deputies.*—They each receive four checks *per diem*.

3. *General Meetings.*—Each member present receives two checks. For each reception of a new agent de change, the fee is four checks.

The members of the Bureau always receive double the above allowances, and the president quadruple.

The honorary agent de change receives the same number of checks as the active members at the sittings which he may attend.

4. *Committee on Accounts.*—Each time its members meet, the president receives four checks, and each of the assistants two.

5. *Committee on Price of Exchange and Gold and Silver.*—The president receives four checks for each meeting, and each of the assistants two.

6. *Settling Days.*—The two agents de change on duty at each settlement receive each four checks.

ART. 228. The Syndical Chamber, when it deems fit, may allow checks as awards, gratuities for assistance, or as an act of munificence, etc.

### CHAPTER IV.

#### RESERVE FUND.

ART. 229. A Reserve Fund is established for the account of each agent. This reserve is fixed at the sum of 100,000 francs.

ART. 230. Whenever there is a change of agents or their partners,

the Syndical Chamber makes a valuation of the Reserve Fund and of the profits realized.

ART. 231. The amount of this valuation is paid by the new incumbent to the outgoing agent de change or to his legal representatives, who retain no further interest in the assets of the Common Fund.

ART. 232. If the retiring agent has ceased to exercise his functions, and received his part of the reserve, the new incumbent makes his payment to the treasury of the company.

ART. 233. The difference between 100,000 francs, the nominal amount of the reserve, and the sum actually paid in, is carried to the account of profit and loss.

## CHAPTER V.

### OF THE USE OF THE RESERVED FUND.

ART. 234. All operations other than temporary investments in funds, producing interest, are prohibited.

ART. 235. The investments provided for by the preceding article are made under the care of the acting-deputies, and as may appear most advantageous and safe to them.

ART. 236. The Syndical Chamber can always place at the disposal of any agent de change his portion of the reserve.

ART. 237. When the Syndical Chamber or the majority of the company (Art. 29) intend to dispose of the whole or part of the Common Fund, the proposition must receive the ballots of two thirds of the members present at the sitting, in order to be adopted and to become binding on all members. The votes of the members for whose benefit this proposition is made is not counted.

ART. 238. As an exception, the Syndical Chamber can, when it considers it as being in the general interest of the company, and without previously consulting the same, make an advance out of the Common Fund to any agent demanding it, equal to the amount of his guarantee, and in addition a sum of 100,000 francs on account of the value

of his membership, provided that he shall confer upon the company the privileges of a sleeping partner and a power of transfer.

ART. 239. A term not to exceed six months will be granted for the repayment of the advances so made. This term having expired, the name of the agent de change who has received such assistance will be officially brought to the knowledge of the company. The memorandum-book of this agent may be taken from him until the day on which his debt shall be completely extinguished.

ART. 240. As an exception, if the agent has made important repayments in the course of six months, the Syndical Chamber may grant him another delay, which must not exceed six months more.

ART. 241. The advances made by the Common Fund bear interest, the rate of which is fixed by the Syndical Chamber.

ART. 242. The sums that have been disposed of as stated in Arts. 236, 237, and 238 must be paid back conformably to the decisions referring to them, and on the orders of the Syndical Chamber.

ART. 243. In case the arrangements relative to the reserve fund give rise to special stipulations as to repayment, the Syndical Chamber must take all possible precautions to have the restitution made within the term agreed upon.

ART. 244. Should, in consequence of such disposition by the company, the reserve fund be reduced to less than 100,000 francs per agent, it shall be at once reconstituted by the entire or partial retention of the ensuing semi-annual dividends.

## CHAPTER VI.

### CREATION OF A SPECIAL GUARANTEE FUND FOR THE BENEFIT OF THE GENERAL TREASURY.

ART. 245. The Syndical Chamber having been charged with concentrating in its hands the purchases and sales of French rentes made through the agency of the General Treasury, a special guarantee fund has been created to provide against the possibilities of false transfers and other liabilities.

ART. 246. This fund, fixed at the sum of 600,000 francs, shall be formed by a retention of 20 per cent. of the net profits of this service.

ART. 247. This amount shall be invested in French rentes, the revenue of which will be added to the present endowment.

ART. 248. When the reserve shall reach the amount fixed by Art. 246, the above deduction from the profits shall cease.

The revenues from the rentes will be included in the general profits of the company after the reserve fund shall amount to 1,000,000 francs.

ART. 249. Every time this reserve shall have been encroached upon, it must be restored to its entirety with the briefest delay possible.

## CHAPTER VII.

### OF THE ESTABLISHMENT OF A SAFE OF DEPOSIT.

ART. 250. A Deposit Safe is connected with the Common Fund.

ART. 251. In this safe shall be placed, among other deposits, the securities which the former sleeping partners of agents de change deposit with the Common Fund as a guarantee of their proportion of the risks and liabilities to which agents de change are liable in their negotiations and transfers of securities.

ART. 252. There are two separate keys for this safe, one of which is in the possession of the syndic, and the other in that of the General Secretary.

ART. 253. All the deposits are attested by a report signed by the syndic and the depositor, and inscribed in a special register.

All withdrawals are attested on the margin of the same register, or under the receipt of the said deposit.

## CHAPTER VIII.

### ADMINISTRATION OF THE DIFFERENT BRANCHES OF THE COMMON FUND AND OF THE COMPANY.

ART. 254. The different branches of the Common Fund and of the company are placed under the direction of the syndic and the Syndical Chamber.

ART. 255. The syndic is charged with the execution of the decisions of the Syndical Chamber and of the company.

He represents the Common Fund, the Syndical Chamber, and the company, as towards third parties.

He can receive all sums due to the company, and consent to all non-suits, withdrawals, and releases, even without authority.

He can also, but only under the authorization of the Syndical Chamber, acquire all real and personal property, and sell and alienate the same.

He can, by special mandate, issue powers of attorney for one or more objects.

Judicial acts are exercised in the name of the Common Fund, of the Syndical Chamber, and of the company; actions at law and proceedings, in that of the syndic.

ART. 256. The different branches of the Common Fund and of the company are administered by a General Secretary.

The General Secretary and all the *employés* are appointed by the Syndical Chamber, which fixes the amount of their salaries, and determines the sum of the allowances and gratuities that shall be accorded to them.

ART. 257. The General Secretary is specially charged :

1. With distributing to the Brokers the contracts, schedules, and memorandum-books which they require.

2. With securing all the receipts insuring to the benefit of the Common Fund, and with making all payments on its account.

3. With superintending the book-keeping and accounts of the said fund, and all the documents relating to the same.

4. With protecting in the courts, under the advice of the company, all interests affecting the Common Fund and the company in general.

ART. 258. A special rule of the Syndical Chamber determines the method of keeping books employed in the offices of the Common Fund.

## CHAPTER IX.

### COMMITTEE ON ACCOUNTS.

ART. 259. A supervisory committee is formed for the Common Fund, called the "Committee on Accounts."

ART. 260. It is composed of a deputy of the syndic delegated every month to preside over it, and of three agents de change, who are nominated (the syndic and the deputies being excluded from such nomination), and who are replaced in the same manner as the members of the Syndical Chamber.

ART. 261. Its mission is to see to the strict observance of the rules governing the Common Fund.

It is charged, besides, with the verification of the books, of the cash, and of the bills and acceptances.

It must also take stock of the stamped contracts, schedules, and memorandum-books.

ART. 262. This committee meets as often as it deems necessary.

It has the right to delegate one or several of its members to make such verifications as it judges opportune. It must, moreover, examine from the 20th to the 25th of each month the balances which are struck off on the 10th, and verify the accounts of the preceding month.

All the account-books, as well as all papers relating to the cash accounts, are placed at its service.

It gives the result of its verifications' every month in a report, and adds its observations thereto.

ART. 263. The Committee on Accounts makes an annual report to the company concerning the administration of the Common Fund during the year.

ART. 264. The supervision of the Common Fund being intrusted to a Special Committee, no right of individual verification or control can be exercised by the members of the company.

## CHAPTER X.

### PENSION FUND FOR THE EMPLOYÉS OF THE COMMON FUND.

ART. 265. There is a pension fund solely and specially established for the purpose of pensioning employés of the Common Fund. Such are :

1. The chief and sub-chief of the Bureau of the General Treasury.
2. The keepers of the *parquet*.

ART. 266. This fund increases by its own capitalized revenues.

In case it is found to be insufficient, it is strengthened by a levy on the general resources of the company.

ART. 267. The right to a pension is settled by the Syndical Chamber as follows :

Every employé who has been in service twenty years, and is fifty years of age, is entitled to one half of the salary which he enjoyed when on active duty.

Every additional year of service brings with it an increase of one thirtieth of the amount of salary ; the pension, however, not to exceed three fourths of such salary, nor a maximum of 6000 francs.

ART. 268. The chamber may make, if it deems proper to do so, such provision in favor of the widow of a deceased employé or ex-employé, who had the right to a pension, as it may deem advisable. In no case, however, can such allowance exceed one half of the amount of pension to which the husband would have been entitled.

In this case, the allowances are taken from the revenues of the pension fund, just as the pensions are themselves.

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## COMMISSIONS.

The rules of the agents de change of Paris fix their commission at one fourth of one per cent. of the stock negotiated, one half to be borne by each of the interested parties.

The agent de change, therefore, according to a decree of the Syndical Chamber, is entitled to receive from both buyer and seller one eighth of one per cent. on sales and purchases for cash or for the

account, of whatever magnitude they be, and also for "carrying over" of the following securities: French rentes; Treasury bonds; Bank of France shares; shares and bonds of the Crédit Foncier; City of Paris bonds; Bonds of cities and departments; shares and bonds of French and foreign railways (with a few exceptions); shares of insurance companies; shares of omnibus companies; shares of the Paris Gas Company; foreign public funds; and of most of the other securities placed on the quotation list of the Bourse. On a small number of securities specified by the decree the commission is raised to one fourth of one per cent.

Public or private securities which are negotiated by virtue of a judgment, of a decision of a family council, or of a legal act prescribing a reinvestment, pay a commission of one fourth of one per cent.

When the commission, calculated at one eighth per cent., is less than fifty centimes per share, it can be raised to that figure, provided it does not exceed one fourth of one per cent.

The minimum commission on shares of the Bank of France is two francs per share in all transactions for the account.

NOTE.—This table of commissions was in existence in 1877; but it seems it has been since modified. See Art. 75.



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